Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JAMES E. BROWN,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioner, *pro se*

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QUESTIONS PRESENTED

1. Whether the Internal Revenue Service ("IRS" or "respondent") may employ the device of classifying a lawful return of excess withholding for 1990 pursuant to IRC § 104(a)(2) as an underpayment of taxes in 1995 on basis of a clarification of the law by this court to avoid operation of, and extend, the two-year statute of limitations in 26 U.S.C. § 6532(b) for recovery of an alleged erroneous refund?

2. Whether the IRS may apply the pronouncement in *United States v. Burke*, **504 U.S. 229 (1992)**, retroactively to create a liability which had no legal existence under the earlier interpretation of § 104(a)(2) of Title 26, United States Code, without regard to the restrictions in *Harper v. Virginia Department of Taxation*, **509 U.S. 86, 97 (1993)** (cases *which were not pending on direct review*)?

3. Whether pursuant to 26 U.S.C. § 7422(e) a taxpayer who has filed suit in the United States Court of Federal Claims ("CFC") to preclude the IRS for unlawfully assessing him with taxes and penalties, and who is issued a notice of deficiency in the same matter while the case is pending, forfeits his right to *"be given the option"* of continuing his suit in the CFC where he is compelled through misconduct of the IRS to file a preemptive petition in the Tax Court to preclude the running of the statute of limitations against him?

4. Whether, notwithstanding the issue with respect to the jurisdiction of the district court under the Tucker

QUESTIONS PRESENTED – Continued

Act (petitioner's back pay entitlement exceeded $10,000 following his retroactive promotion from GS-8 to GM-13 in 1989), the respondent and the United States Tax Court were bound under the doctrines of judicial estoppel and *res judicata* by the holding of the United States District Court for the District of Columbia that an award of damages based upon the unlawful denial of promotion of a federal employee in violation of Title VII does not constitute an award of "back pay" or wages within meaning of the Back Pay Act, 5 U.S.C. § 5596?

5. Whether the United States Tax Court, as an Article 1 court, is bound by the "law of the case" doctrine pronounced in ***Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988)**, with respect to the decisions of the United States Court of Federal Claim and the United States Court of Appeals for the Federal Circuit in the same matter?

6. Whether the United States Tax Court, as an Article 1 court, had jurisdiction pursuant to 26 U.S.C. §§ 7422(e) and 7459(e) to determine whether the petitioner, a federal employee, received and was entitled to the $266,864.00 the respondent allegedly paid him in back wages on basis of a finding by the United States Equal Employment Opportunity Commission ("EEOC") that the employee had been denied promotion in violation of Title VII?

7. Whether the return of $30,045.66 (including interest) in withholding from a Title VII award based upon judicial interpretations of 26 U.S.C. § 104(a)(2) prior to

QUESTIONS PRESENTED – Continued

the decision in ***United States v. Burke*, 504 U.S. 229 (1992)**, constitute an erroneous refund under 26 U.S.C. § 6514?

8. Whether the IRS may assess interest on excess withholding returned to a taxpayer on basis of a legally effective pre-***Burke*** interpretation of 26 U.S.C. § 104(a)(2) in 1990 as an unauthorized exception (in contravention of congressional mandate) to 26 U.S.C. § 6404(e)(2)?

9. Whether the proscription against application of 26 U.S.C. § 7502 to tax returns mailed from outside the United States through other than the United States Postal Service is binding on the IRS and requires cognizance by the United States Tax Court?

10. Whether a federal employee who has sworn under oath that he did not receive money allegedly paid him from the U.S. Treasury, and whose pay records are wholly in possession of the United States, may be taxed on, and otherwise prosecuted and penalized, without any evidence that such payment was factually disbursed from the Treasury of the United States or received by the employee?

11. Whether pursuant to 26 U.S.C. 61, 212(1) and 912(1), if ***United States v. Burke*, 504 U.S. 229 (1992)**, may be lawfully applied retroactively to 1990 tax decisions, a federal employee is entitled to exclude from his gross income the litigation expenses incurred in obtaining judgment to enforce the EEOC's decision and that portion of back pay due him which is based upon his non-taxable overseas entitlements under Chapter 59 of Title 5?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, James Brown, pro se, hereby respectfully prays that a writ of certiorari issue to review the decision of the U.S. Court of Appeals for the Sixth Circuit. Alternatively, petitioner prays for summary reversal of the judgment below on grounds that the decision was precluded by clear mandates of the Federal Court Improvement Act, Internal Revenue Code and controlling legal precedents of this Court. See, e.g., ***Bowers v. N.Y. & Albany Lighterage Co.*, 273 U.S. 346, 349-350 (1927)** (limitations period on collection of taxes must be liberally construed in favor of taxpayer and where [2-year limitations period in 26 U.S.C. § 6532(b)] bars collection by suit, it bars collection by *every* other process, proceeding and device).

OPINIONS AND ORDERS BELOW

1. The decision of the United States Court of Appeals for the Sixth Circuit, ***James E. Brown v. Commissioner of Internal Revenue*, No. 98-1444, Slip Op., filed April 27, 1999**, is unpublished and is reproduced in Appendix A, pp. 1a-6a.

2. The decision of the United States Tax Court, ***James E. Brown v. Commissioner of Internal Revenue*, Docket No. 10823-95, March 10, 1998**, with **Tax Court Memo No. 1997-567 (Dec. 23, 1997)**, is unpublished and is reproduced in Appendix B, pp. 7a-20a.

3. The opinion of the United States Court of Federal Claims, ***James E. Brown v. United States*, CFC No. 94-227C, Slip op. Feb. 22, 1996, affirmed 95 F.3d 1165 (Fed. Cir. 1996) (Table)**, is the unpublished ***law of this case*** and is reproduced in Appendix C, pp. 21a-44a.

4. The Order of the U.S. District Court is reported in ***Brown v. Marsh*, 713 F.Supp. 20, 26 (D.D.C. 1989)**, and is reproduced in Appendix D, pp. 45a-46a.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was issued under date of April 27, 1999. This petition was, accordingly filed the 25th day of July, 1999, within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part, that:

> "No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

Section 6514 of the Tax Code meticulously outlines the types of tax credits and refunds which "shall be considered erroneous," and specifies procedures for the Government's recovery of any such "erroneous" refund payment. The statute, § 6514(a)(3), provides in pertinent part:

> "(3) Recovery of erroneous refunds
> For procedures by the United States to recover erroneous refunds, see sections 6532(b) and 7405."

Section 6532 of the Tax Code, 26 U.S.C. § 6532(b), provides in pertinent part, that:

> "(b) Suits by United States for recovery of erroneous refunds

> Recovery of an erroneous refund by suit under section *7405* shall be allowed only if such suit is begun within 2 years after the making of such refund, except that such suit may be brought at any time within 5 years from the making of the refund if it appears that any part of the refund was induced by fraud or misrepresentation of a material fact."

Section 7405 of the Tax Code, 26 U.S.C. § 7405(a)-(b), provides in pertinent part, that:

> "(a) Refunds after limitation period
> Any portion of a tax imposed by this title, refund of which is erroneously made, within the meaning of section *6514*, may be recovered by civil action brought in the name of the United States.
>
> (b) Refunds otherwise erroneous
> Any portion of a tax imposed by this title which has been erroneously refunded (if such refund would not be considered as erroneous under section 6514) may be recovered by civil action brought in the name of the United States."
>
> * * *
>
> (d) Periods of limitation
> For periods of limitations on actions under this section, see section *6532(b)*.

Section 6404(e)(2) of the Tax Code, 26 U.S.C. § 6404(e)(2) provides in pertinent part:

> "(2) Interest abated with respect to erroneous refund check
> The Secretary *shall* abate the assessment of all interest on any erroneous refund under section 6602 until the date demand for repayment is made, unless –

(A) the taxpayer (or a related party) has in any way caused such erroneous refund, or

(B) such erroneous refund exceeds $50,000."

Section 7422(e) of the Tax Code, 26 U.S.C. § 7422(e), provides in pertinent part:

"(e) Stay of proceedings

If the Secretary prior to the hearing of a suit brought by a taxpayer in a district court or the United States Court of Federal Claims for the recovery of any income tax, estate tax, gift tax, or tax imposed by chapter 41, 42, 43, or 44 (or any penalty relating to such taxes) mails to the taxpayer a notice that a deficiency has been determined in respect of the tax which is the subject matter of taxpayer's suit, the proceedings in taxpayer's suit shall be stayed during the period of time in which the taxpayer may file a petition with the Tax Court for a redetermination of the asserted deficiency, and for 60 days thereafter. . . . "

Section 7502 of the IRC, 26 U.S.C. § 7502(a) (1994), provided in pertinent part that:

(a) General Rule.

(1) If any return, claim, statement, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date * * * is after such period or such date, delivered by United States mail to the agency, officer, or office with which such return, claim, statement, or other document is required to be filed, or to which such payment is required to be made, the date of the ***United States postmark*** stamped on the cover in which such return, claim, statement, or other document, or payment, is mailed shall be deemed to be the date of delivery or the date of payment, as the case may be.

(2) Mailing requirements. This subsection ***shall apply only if*** –

* * *

(B) the return, claim, statement, or other document, or payment was, within the time prescribed in subparagraph (A), ***deposited in the mail in the United States*** * * * .

STATEMENT OF THE CASE

FACTUAL BACKGROUND

The petitioner was at all time pertinent to this case an employee of the respondent. The history of the case is reported in ***Brown v. Marsh*, 777 F.2d 8 (D.C. Cir. 1985).**

In 1973 the petitioner initiated a *pro se* civil action against the Secretary of the Army ("Secretary" or "Army") alleging, inter alia, that he had been *intentionally* discriminated against in violation of Executive Order 11478 and the Equal Employment Opportunity Act by the respondent's denial of promotion and refusal to pay him in accordance with law. The petitioner also filed a complaint with the United States Equal Employment Opportunity Commission ("EEOC"). This suit was later consolidated with a second suit filed by the petitioner in the U.S. District Court for the District of Columbia pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, et seq. ***Brown v. Alexander*, C.A. 80-1169, D.D.C., filed May 8, 1980.** The District Court declined to grant the petitioner relief and he appealed.

On October 31, 1985, while petitioner's appeal was pending before the U.S. Court of Appeals for the District of Columbia Circuit, the EEOC issued a decision finding that the petitioner had been intentionally discriminated

against in violation of 42 U.S.C. § 2000e-16. The Commission recommended that the petitioner be promoted to GS-9 retroactive to August 1975 with back pay and other benefits pursuant to the Back Pay Act. The Secretary declined to accept the Commission's recommendation and surreptitiously initiated a campaign to have the decision changed.

On November 15, 1995, the Court of Appeals reversed the District Court's decision and remanded the case to the court. ***Brown v. Marsh*, 777 F.2d 8 (D.C. Cir. 1985)**.

Upon learning of the Commission's decision and the Secretary's efforts to have the decision changed, on remand of his case to the district court, the petitioner (with the support of the U.S. Court of Appeals for the District of Columbia Circuit), sought a declaration from the District Court as to the binding effect of the Commission's findings and recommendations pursuant to the mandamus statute, 28 U.S.C. § 1361.

On May 12, 1988, the District Court issued its decision on the petitioner's § 1361 mandamus request finding that the Secretary was bound by EEOC's decision and ordered the Secretary to promote the petitioner to GS-9 retroactive to August 21, 1975, with backpay, all within-grade increases, pay adjustments, and any promotions that may have accrued by way of restructuring the position to which the petitioner was to be retroactively promoted. ***Brown v. Marsh*, 729 F.Supp. 864, 868 (D.D.C. 1988), *Brown v. Marsh*, 713 F.Supp. 20, 26 (D.D.C. 1989), App. *infra*, pp. 34a-35a.**

On June 19, 21 and 23, 1989, in compliance with the EEOC's decision and the District Court's orders relative thereto, the Army issued statutory notices of personnel actions promoting the petitioner from GS-8 to GM-13

retroactive to August 21, 1975. Based upon these retroactive promotions, the Army determined that pursuant to the Back Pay Act, 5 U.S.C. § 5596, 5 U.S.C. §§ 5332, 5334, 5402, 5404, the petitioner was entitled backpay in the amount of $234,228.31. **App.** ***infra*****, pp. 22a, 45a-46a.**

In pleadings filed with the court, under date of April 4, 1990, the Secretary stated that $138,432.55 of the $234,228.31 due the petitioner had already been paid and that the petitioner was due an additional $95,795.76, without interest, if the amount was paid by May 31, 1990. The petitioner denied receiving the $138,432.55 which was allegedly paid him some time prior to April 4, 1990. **App.** ***infra*****, p. 22a.**

In October 1991, the respondent filed pleadings in the District Court contesting the payment of the back wages on basis of the Back Pay Act, 5 U.S.C. § 5596.[1] See 28 U.S.C. § 1345 (1988) (statute granting jurisdiction to district courts to hear Government claims against private parties). Respondent argued that the money due the petitioner as a result of his retroactive promotions was to be paid as compensatory damages under Title VII (42 U.S.C. § 2000e-16) rather than back wages under the Back Pay Act. The significance of this, argued the respondent, was

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[1] From 1971 through 1985 the petitioner was without counsel and his suits were filed and prosecuted pro se. In 1986 the U.S. District Court for the District of Columbia appointed the Washington Lawyer's Committee for Civil Rights Under Law to represent the petitioner. At this point petitioner was represented by court-appointed attorneys. Following the grant of the relief he had pursued for some nineteen years, the petitioner did not participate in further proceedings before the District Court. And while there are a number of decisions under the caption of the petitioner's case, the proceedings and decisions were principally the individual efforts of the court-appointed attorneys to obtain fees and interest of such fees.

that, unlike the Back Pay Act, the United States had not waived its immunity so as to allow the pre-judgment payment of interest on awards under Title VII. The District Court subsequently granted the respondent's request to classify the judgment as compensatory damages under Title VII. **App.** *infra*, **p. 22a.**

The petitioner's position was that once he was promoted retroactive to August 21, 1975, title to the $234,228.31 in back wages under the Back Pay Act vested in him as protected property under the Fifth Amendment and any dispute relative to the payment of the salaries of the positions to which he had been appointed rested exclusively in the Court of Federal Claims and the Federal Circuit pursuant to the Tucker Act, 28 U.S.C. §§ 1295(a)(2) and 1491(a)(1) (1988). The jurisdiction of the Court of Claims was unequivocal, notwithstanding the fact that the District Court had jurisdiction over the Secretary's action to recover the $138,432.55 he asserted that he had already paid the petitioner prior to April 4, 1990. 28 U.S.C. § 1345 (1988). **App.** *infra*, **p. 22a.**

On November 5, 1990, the General Accounting Office issued the petitioner an interim payment of $98,198.08 against the gross compensatory award and remitted $27,118.33 to the IRS for potential taxes. The GAO provided the IRS Center, Bensalem, PA, with a copy of the Certificate of Settlement verifying the disbursement and tax transaction on January 29, 1991.

On June 6, 1991, with the advice and assistance of the respondent's tax advisor, the petitioner filed his income tax return for 1990 with the IRS Center, Philadelphia, PA, noting the $125,316.41 payment as compensatory damages in settlement of his Title VII suit. Consistent with the law in effect at the time and the respondent's advice, the petitioner requested a refund of the $27,118.33 withheld

from the award pursuant to 26 U.S.C. § 104(a)(2). Petitioner did not exclude the nontaxable elements of the award from his income as authorized by 26 U.S.C. §§ 61, 212(1) and 912(1). The District Court declined to award the petitioner costs and expenses for the 13 years of litigation between 1971 and 1986 on grounds that he was employed during this period and the court had ordered the Army carry the petitioner in an official status at all times and cover his litigation expenses. See ***Order, Brown v. Marsh,* D.D.C.Civil Action No. 80-1169 (CRR), filed August 20, 1992; *Brown v. Marsh,* 707 F.Supp. 21, 22 (D.D.C. 1989).**

On June 20, 1992, following communications with the IRS, the petitioner amended his 1990 return by making pen and ink changes to the original June 6, 1991, return and remitted copies to the IRS centers at Philadelphia and Holtsville, NY.

In a letter dated March 8, 1994, the IRS notified the petitioner that it was assessing him with **$66,369** in taxes, penalties and interest for failure to report on his 1990 tax return **$125,316** in income he received in settlement of his Title VII suit against the Secretary of the Army in that year. The respondent further informed the petitioner that he had also failed to report on his 1991 return the receipt of an additional **$81,669.00** payment against the settlement, or to claim a refund of the **$47,277.00** in potential taxes withheld from that payment. Respondent's letter informed the petitioner that it would apply the refund for overpayment of taxes for 1991 to the alleged underpayment for 1990. Respondent made no reference to the $30,045.66 refund issued the petitioner for 1990.[2]

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[2] The Internal Revenue Code ("IRC") requires the IRS give notice to a taxpayer of an alleged erroneous refund prior to

In defense of the respondent's assessment, petitioner produced evidence that he had properly reported the receipt of all money factually received in settlement of his suit in 1990, that he had not received the money allegedly paid in 1991, and that the District Court had ruled that the 1990 payment was not back wages pursuant to the Back Pay Act, prompting its agents to declare the award not taxable pursuant to 26 U.S.C. § 104(a)(2). Alternatively, petitioner argued that if the 1990 payment was taxable retroactively, taxes had to be computed and exclusions allowed in accordance with 26 U.S.C. §§ 61, 212(1) and 912(1). Petitioner relied principally on ***Roemer v. Commissioner*, 716 F.2d 693, 700 (9th Cir. 1983)**; ***Reese v. United States*, 28 Fed. Cl. 702 (1993)**; and ***Anderson v. United States*, 929 F.2d 648 (Fed. Cir. 1991)**. Petitioner's request for proper calculation of the alleged 1990 tax deficiency was summarily denied as time-barred. Respondent rejected petitioners affidavits and proof that the 1991 payment did not occur on grounds that IRS, Social Security Administration, and District Court records were irrefutable as to the entitlement and payment of the $234,228.00. **App.** *infra*, **pp. 22a, 44a-46a.**

On April 7, 1994, petitioner filed a complaint in the Court of Federal Claims ("CFC") alleging, inter alia, that the respondent was unlawfully assessing him with taxes,

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initiating collection action. Interest on an erroneous refund does not accrue until prior notice has been given and the taxpayer allowed an opportunity to return the money erroneously received. Interest on money received from the Treasury of the United States due to an alleged mistake in law does not accrue until after the recipient refuses to return money he knows rightfully belongs to the Government, or a court of competent jurisdiction determines that the money properly belongs in the coffer of the United States. See 26 U.S.C. § 6404(e)(2).

penalties and interest on money which he had not received, and had unlawfully applied a refund which it alleged was due him for 1991 to taxes, penalties and interest he did not owe for 1990.

In response, the respondent moved to dismiss the complaint on grounds that the complaint failed to state a claim upon which relief could be granted in that the claims were barred by the statute of limitations in 26 U.S.C. §§ 6501, 6511, 6532.

On May 12, 1995, the respondent issued the petitioner a statutory Notice of Deficiency assessing him with a tax deficiency of $71,212 on unreported income of $230,121 for 1990 and 1991.[3] The notice informed the petitioner that he would be credited with the $47,277 in withholding not claimed on his 1991 return, and that if he did not sign an accompanying waiver of protest, and did not file a petition for redetermination in the U.S. Tax Court, the assessment would be final and without recourse pursuant to 26 U.S.C. § 6213(c). The petitioner declined to sign the waiver.

On June 20, 1995, petitioner filed a petition for redetermination in the Tax Court asserting that the Notice of Deficiency was invalid and noting that the petition was filed as a preemptive measure on basis of the tax refund and Tucker Act action pending before the CFC.

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[3] Under date of May 22, 1998, the respondent sent the petitioner a demand for payment of taxes, penalties and interest on the 1990 refund in the amount of $81,088.98. The imposition of interest on erroneous refunds in amounts under $50,000.00 without proper notice and opportunity to return the alleged erroneous payment (except in cases of fraud) is proscribed by 26 U.S.C. § 6404(e)(2). The Court of Appeals for the Sixth Circuit denied the petitioner motion for a protective order from the unlawful assessment and collection.

In response, the respondent moved the CFC to dismiss on grounds that 26 U.S.C. § 7422(e) deprived the CFC its jurisdiction.

Petitioner opposed the respondent's motion to dismiss on grounds that, inter alia: (1) the notice of deficiency was fraudulent; (2) 26 U.S.C. § 7422(e) required the court to stay proceedings in order for him to exercise his statutory right to choose a single forum in which to try his claims; (3) the Tax Court, as an Article I tribunal, did not have jurisdiction over his Tucker Act and tax refund claims; (4) that dismissal or transfer would create an impermissible splitting of the cause of action; and (5) the Tax Court lacked jurisdiction over the tax issues because: (a) the notice of deficiency was invalid on its face, having been issued outside the statute of limitations in 26 U.S.C. §§ 6501(a), 6511(a) and 6532(b); (b) the respondent had admitted before the CFC that the 3-year and 2-year statutes of limitations had run with respect to the 1990 return and was estopped from arguing the contrary in the Tax Court; and (c) the notice of deficiency was fraudulent and clearly stated that he was due a credit of $47,277 for 1991, showing that there was no deficiency for the Tax Court to redetermine. 26 U.S.C. §§ 6211-14, 7442.

In its decision of February 22, 1996, the Court rejected the petitioner's arguments, and, citing ***Columbia Bldg., Ltd. v. Commissioner*, 98 T.C. 607, 611 (1992)**, held that 26 U.S.C. §§ 7422(e) and 7459(e) conferred jurisdiction over the petitioner's Tucker Act and Tax Refund claims on the Tax Court. ***Brown v. United States, supra,*** App. *infra*, **at pp. 28a-29a.**

The proceedings which form the basis for this Petition followed.

STATEMENT OF CONTROVERSY

This case is one of those nightmarish instances in which the IRS has misused its extraordinary powers and judicially-created presumptions of correctness to unlawfully prosecute and assess taxes against an ordinary citizen. This case is unusual in that it was the Treasury Department which allegedly remitted to the taxpayer, a federal employee, the large sums of public funds at issue in this case. In substance this tax and federal pay case is one in which the Government alleges that the petitioner negligently failed to report and pay taxes on $266,864.00 it allegedly paid him in 1990 and 1991. In form, however, the Government seeks to both improperly prosecute the petitioner for non-payment of taxes and to retroactively apply this court's decision in ***United States v. Burke*, 504 U.S. 229 (1992)**, to reclaim money it refunded the petitioner for 1990 on basis of the pre-***Burke*** interpretation of IRC § 104(a)(2).

Over the term of the Government's prosecution of its tax claims against the petitioner, petitioner repeatedly denied under oath that he had received the $266,864.00 allegedly paid him and produced GAO and Treasury Department records which defied the IRS" claims. However, relying solely on what the IRS subsequently termed its *"bogus"* records, and without offering *any proof* of disbursement from the Treasury or receipt of the money by the petitioner, on May 12, 1995, after the running of all possible statutes of limitations, the Commissioner issued the petitioner a notice of deficiency assessing him with taxes and penalties on the alleged payments.

On the uncontroverted facts of this case, the controlling issues in this case are well settled by the unambiguous provisions of the IRC, the Back Pay Act, the Tucker Act, and precedents of this court. However, there

are substantive conflicts between the circuits and this Court's opinion in ***O'Gilvie v. United States*, 519 U.S. 79 (1996)**, with respect to the binding effect of the 2-year limitations period in 26 U.S.C. § 6532(b) on the IRS. The circuits are also divided as to the treatment of the common law "mailbox rule" in conjunction with the 1988 and 1994 versions of 26 U.S.C. § 7502 as noted in ***Carroll v. Commissioner*, 71 F.3d 1228 (6th Cir. 1996)**. In the instant case, the court below believed that it was compelled by Sixth Circuit precedents to apply the 1994 provisions of 26 U.S.C. § 7502 to the circumstances of the case notwithstanding the fact that the statute specifically excluded its application to the petitioner because he was on official Government assignment in a foreign country at the time he filed his 1990 tax return and could not come within coverage of the statute. As the *Carroll* court noted, this Court should resolve this conflict. **71 F.3d at 1232.**

Moreover, because the Government's conduct in the case is unconstitutionally motivated and unprecedented, it reaches an inordinate number of statutory provisions and precedents of this Court, including ***Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988)**. This Court's decision in *Christianson*, supra, makes clear the obligations of Article III courts with respect to the application of the law-of-the-case and estoppel doctrines in cases transferred to them on jurisdictional grounds. However, in the instant case the court below, an Article I court, held that the CFC erred in its decision transferring this case to it on jurisdictional grounds, yet proceeded to try the case without application of the law-of-the-case and estoppel doctrines mandated by *Christianson*, supra. Notwithstanding that *Christianson*, supra, and its treatment by the Federal

Circuit is comprehensive and clear, this case demonstrates a need for this Court to provide the Tax Court and the circuits with further guidance as to its proper application with respect to Article I tribunals and quasi-judicial proceedings.

Most notable in this case is that despite this Court's clear mandate in ***Bowers v. N.Y. & Albany Lighterage Co.***, supra, and the recent decisions of the Federal and 9th circuits holding that the respondent's contention that the IRS is not bound by the 2-year limitations period in IRC §§ 7405, 6532 is "inherently inconsistent with Congress" specific provision that allows the Government two years in which to sue for an erroneously paid refund," the respondent continues to advance this position, and the court below has supported it. See ***Stanley v. United States*, 140 F.3d 1023, 1029 (Fed. Cir. 1998)**; ***O'Bryant v. United States*, 49 F.3d 340, 346 (7th Cir. 1995)**. The decisions below are also in blatant disregard of the precedents of this court in ***Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 842 (1984)**; ***United States v. Garbutt Oil Co.*, 302 U.S. 528, 534-35 (1938)**; and ***Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993)**.

While, save IRC §§ 6532(b) and 7502, which have not been addressed by this Court in the context where the return of excess withholding was neither erroneous nor unlawful at the time of the refund, all of the controlling statutes and precedents of this court are so clear that the decision below goes beyond simple error. For example, it is difficult to discern any reasonable interpretation of ***Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993)**, which would facilitate the IRS' conduct to reclaim tax refunds issued pursuant to IRC § 104(a)(2) prior to ***Burke***. Even more perplexing in the case at bar is

that even if such refunds could be recovered as having been issued under a mistake of law, IRC § 6404(e)(2) absolutely prohibits the Commissioner from assessing interest on such money, which factually belonged to, and belongs to, the petitioner until this Court overrules ***Harper***, supra; ***Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 315 (1994)**; and ***Landgraf v. USI Film Products***, 511 U.S. 244, 269 (1994) with respect to the court's limitation of retroactivity to *"cases pending on direct review"* before a court of competent jurisdiction at the time of the Court's pronouncement of a new or revised interpretation of law.

The respondent contends that because its records are presumptively correct, the petitioner must prove that he did not receive the money it alleges it paid him and that the IRS factually received his 1990 return in June, 1991. The respondent's assertions in this case subjects the petitioner to *criminal prosecution* because he has sworn under oath and before four federal courts that he did not receive the $266,864.00 in back wages and $44,275.00 in litigation expenses allegedly paid him; and that the June 6, 1991, date on all of the returns and other documents in the federal archives is an original date.

Of course the petitioner cannot prove a negative, or facts which are wholly and exclusively in the control of the respondent. However, these issues are governed by what some courts refer to as the ***"Mitchell Offset Exception."*** See ***Lee Brick and Tile Co., Inc. v. United States***, 132 F.R.D. 414, 420-23 (1990); ***Mitchell Offset Plate Service, Inc. v. Commissioner of Internal Revenue*, 53 T.C. 235 (1969)**. Thus, where, as here, the respondent has admitted that his records are materially and manifestly inaccurate as to the petitioner, and contain ***"bogus and not bona fide"*** documents and entries relating to the

taxes of the petitioner, *"every presumption of correctness of the Government's records must fall."* **Id.**

It is undisputed that the respondent returned $27,118.33 of the $74,395.00 it withheld from back pay it admits it owed the petitioner on basis of a judicial interpretation of IRC § 104(a)(2) in effect prior to the Court's clarification of the statute in ***United States v. Burke*, 504 U.S. 229 (1992).** Under this scenario, and under the least favorable interpretation and application of the law, the petitioner would still owe the respondent nothing because the mandates of the Supreme Court preclude the respondent from applying its pronouncement of statutory construction retroactively to any case ***which was not pending on direct review*** before a court of competent jurisdiction at the time of the announcement. Even if ***Burke*** could be applied retroactively and the statute of limitations in 26 U.S.C. §§ 6501(a) and 6532(b) did not bar the involuntary return of the $30,045.00 refund, the most the law could require is that he give the $30,045.00 to the IRS, without penalty or interest, since the money at all times lawfully belonged to the petitioner.

It is well settled in law that the new interpretation of ***United States v. Burke***, and like cases, may not be applied retroactively to create the $81,088.98 liability the respondent demands in this case. Moreover, if the decision of this Court in ***O'Gilvie v. United States*, 519 U.S. 79 (1996)**, with respect to 26 U.S.C. § 6532(b) is any more than a whistle in the wind, the 2-year limitations period in IRC § 6532(b) raises an ***absolute bar*** to the respondent's taking of the money lawfully returned to the petitioner on basis of the earlier interpretation of § 104(a)(2). The respondent's assertion that § 6532(b) does not govern the procedures for recovery of alleged erroneous refunds cannot be supported in law. See ***Stanley v. United States***,

supra; ***O'Bryant v. United States,*** supra; and ***Bowers v. N.Y. & Albany Lighterage Co.,*** supra. The 2-year statute of limitations in § 6532(b) may not be interpreted as being ***"superfluous."*** And, if the provisions of the statute is not intended by Congress to be ***"superfluous"*** (an absurd proposition), "no officer of the Government has the power to waive or extend the statute of limitations" in 26 U.S.C. § 6532(b). ***United States v. Garbutt Oil Co.,*** **302 U.S. 528, 534-35 (1938).**

While, save the decision of the CFC, there is little doubt that the Tax Court and the Sixth Circuit did not have jurisdiction over the petitioner's Tucker Act and Tax Refund claims, ***United States v. Hohri,*** **482 U.S. 64, 72-73 (1986)**, it must also be noted that the petitioner's contention that under IRC § 7422(e) he was entitled to ***"be given the option"*** of purs[u]ing his claims in the CFC is fully supported by this court's decision in ***Flora v. United States,*** **362 U.S. 145, 166 (1960)**. Consequently, the holding below is manifest error which fully warrants plenary review by this Court.

PROCEEDINGS BELOW

A. THE U.S. COURT OF FEDERAL CLAIM

The petitioner's April 7, 1994, complaint in the CFC was filed pursuant to 28 U.S.C. § 1491(a)(1) and 28 U.S.C. § 1346(a)(1) to restrain the respondent from unlawfully taxing him on money which it had not paid him and from applying money it asserted it owed him for 1991 to an alleged 1990 tax debt he did not owe.

In its decision of February 22, 1996, the CFC held that the respondent's issuance of a Notice of Deficiency to the petitioner, even though untimely, and the petitioner's contest of the notice by filing a petition with the Tax

Court, deprived the CFC of its jurisdiction and vested jurisdiction over both his Tucker Act, 28 U.S.C. § 1491(a)(1), and Tax Refund, 28 U.S.C. § 1346(a)(1), claims in the Tax Court pursuant to 26 U.S.C. §§ 7422(e) and 7459(e). ***James E. Brown v. United States*, CFC No. 94-227C, Slip op. Feb. 22, 1996, affirmed 95 F.3d 1165 (Fed. Cir. 1996) (Table). App., *infra*, p. 20a.**

The petitioner opposed removal of his claims from the CFC to the Tax Court on grounds that, *inter alia*, the Tax Court lacked jurisdiction, the IRS' notice of deficiency was untimely, fraudulent and invalid, and that he was entitled, under 26 U.S.C. § 7422(e), to elect the court in which to pursue his claims. He had certified under oath that the IRS' records with respect to alleged payment and receipt of money in connection with his suit against the Army were unconscionably inaccurate and tainted.[4] Moreover, because the respondent's claims against the petitioner were a disguised attempt under the Internal Revenue Code ("IRC") to take from the petitioner money lawfully paid and received, jurisdiction was proper only in the Court of Federal Claims or the district court. 28 U.S.C. § 1346(a)(1); 26 U.S.C. §§ 6532(b), 7405. See also 28 U.S.C. § 2514(a).

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[4] The respondent's assertion that it conducted an extensive investigation to determine that the petitioner did not receive the $81,669.00 is simply sham to transfer liability for its errors and intransigence to the petitioner. The respondent had petitioner's affidavits and the records of both the Treasury Department and the General Accounting Office for more than two years showing that the only disbursement to the petitioner was the $98,198.08 he reported to the IRS on his June 6, 1991, Form 1040. There is no indication that respondent examined the Army's records to ascertain whether additional funds had been disbursed from its appropriations in connection with the petitioner's suit against the Secretary.

This case is unusual in that there are no known published cases in which the United States has so aggressively and in clear violation of law attempted to take money it knows, or should know, it is not due. Moreover, the respondent's conduct with respect to it efforts to reclaim money lawfully paid under the 1990 interpretation of IRC § 104(a)(2), on basis of a subsequent clarification of that statute by this Court, cannot be reconciled in law in view of the clarity of this Court's decision in ***Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993)** (new pronouncements of interpretations of law are to be applied retroactively only to ***"cases pending on direct review"*** before a court of competent jurisdiction at the time of the announcement). The small refund in this was neither ***"erroneous"*** nor unlawful under any statute. Moreover, because title vests in such money at the time it is paid, there are no specific statute of limitations applicable to its return.

The command of this Court in ***Harper***, supra, is that when it interprets a statute, that interpretation will be applied to all future cases and those ***"pending on direct review"*** before a court of proper jurisdiction at the time of the new pronouncement. The tax issue in this case was not *pending* before any court prior to the filing of the petitioner's complaint in the CFC on April 7, 1994. Thus, under the clear directions of this Court, the respondent is prohibited from filing suit, causing a suit to be filed, or taking any other action to deprive the petitioner of money which was rightfully his at the time it was returned. See ***Dotson v. United States*, 87 F.3d 682, 686-87 (5th Cir. 1996); *Gerbec v. United States*, No. 97-3224/3269, 6th Cir., filed Jan. 15, 1999.**

Below, the respondent steadfastly argued and prosecuted its counterclaims against the petitioner in the CFC

and before the U.S. Court of Appeals for the Federal Circuit on grounds that it had paid the petitioner $266,864.00, and had withheld from that payment some $74,395.00 for payment of potential taxes. These courts entered judgment in favor of the respondent on these alleged facts. Thus, the respondent was unequivocally ***judicially estopped***, and barred by the doctrines of ***collateral estoppel and res judicata***, from mending its hold on these asserted facts to the disadvantage of the petitioner after successfully having the case moved from the Court of Federal Claims to the Tax Court. See ***Arizona v. California*, 460 U.S. 605, 618 (1983)**; ***Reynolds v. Commissioner*, 861 F.2d 469, 472-74 (6th Cir. 1988)**; ***Teledyne Industries, Inc. v. N.L.R.B.*, 911 F.2d 1214, 1218 (6th Cir. 1988)**. The Tax Court was also bound by the findings and judgment of the CFC, as affirmed by the Federal Circuit under the ***"law of the case"*** doctrine. See ***Christianson***, supra.

B. THE U.S. TAX COURT

Petitioner objected to the jurisdiction of the Tax Court on the same grounds he opposed removal of his case from the CFC to the Tax Court. To wit, (1) that the IRC § 104(a)(2) return of money withheld from proceeds of the 1990 Title VII award was a lawful return of money and outside the improper refunds and credits of money set forth in IRC § 6514(a); (2) that the return of the 1990 withholding pursuant to the then valid interpretation of IRC § 104(a)(2) did not make his tax return imperfect or incomplete so as to allow an assessment in the amount of the refund as a deficiency under the IRC; (3) that the Notice of Deficiency was fraudulent and untimely under IRC §§ 6532(b) and 6501(a); (4) that on the facts alleged

there was no deficiency for either 1990 nor 1991 to facilitate exercise of the Tax Court's jurisdiction pursuant to IRC §§ 7441 et seq.; and (5) the Tax Court could not ignore the CFC's decision and IRC § 6514(a) to exercise partial jurisdiction pursuant to IRC § 7422(e). He asserted that if jurisdiction was to be exercised, the IRS' computation of taxes had to be revised to conform to the judicially determined facts and the provisions of IRC §§ 61, 212(1) and 912(1). **App., *infra*, p. 7a.**

In March, 1996, the petitioner was required to travel from Heidelberg, Germany, to Nashville, Tennessee, for trial on the IRS' claims before the Honorable Carolyn Miller Parr, Judge. On March 11, 1996, Judge Miller ruled from the bench [in open court] that the CFC had erred as to the Tax Court's jurisdiction pursuant to 26 U.S.C. §§ 7422(e) and 7459(e), but that the court would exercise jurisdiction, presumably, pursuant to 26 U.S.C. §§ 6212 and 6213(c). **Id.** The court refused to remand the case to the CFC and to apply the law-of-the-case and estoppel doctrines mandated by ***Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988)**, to the proceedings before it. The Tax Court suggested that the petitioner file a new complaint in the "Claims Court" [sic] to adjudicate his Tucker Act and Tax Refund (26 U.S.C. §§ 61, 212(1) and 912(1)) claims.

At the March 11 trial, prior to going on record, the IRS admitted to the Tax Court that the charge in its May 12, 1995, Notice of Deficiency that the petitioner had received $81,669.00 in unreported income was "bogus." The IRS further claimed that the records documenting the alleged payment of the $81,669.00 and tax withholding of $47,277.00 it asserted was due the petitioner in its Notice of Deficiency did not exist and were not "bona fide." The Tax Court rejected petitioner's suggestion that the IRS'

admission that the Notice of Deficiency was substantially and materially inaccurate was malicious and too late. See 26 U.S.C. § 7430. The Tax Court, however, declined to entertain petitioner's motion for reimbursement of the substantial costs he incurred in defending the "bogus" charge and in traveling from Heidelberg, Germany, to Nashville, TN, for trial. See 26 U.S.C. § 212(3).

The Tax Court's recognition that the IRS' claim was factually an action *"for recovery of an erroneous refund"* was also fatal to that court's jurisdiction. **App., *infra*, p. 12a.** See, e.g., ***United States v. Wilkes*, 946 F.2d 1143, 1147-48 (5th Cir. 1991).**

C. THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

The tone of the Sixth Circuit's decision is that the petitioner somehow acted improperly in defending himself against the unlawful assessments. The court refers to the tainted IRS records as "mysterious," but does not condemn the respondent for its tenacious 5-year prosecution of the petitioner on basis of the "bogus" records. Contrary to the court's inference, the petitioner stringently contested under oath the accuracy of records showing him to be entitled to a $47,277 tax credit. Respondent, however, proceeded against the petitioner on basis of its stated belief that *"such a fact-supported and judicially-documented error was not possible."*

The decision of the Court of Appeals affirming the decision of the Tax Court is erroneous is every respect, and not only contravenes the clear congressional mandates and proscriptions in the IRC, but is in direct contradiction of this Court's precedents relative to application of the *estoppel* and *law-of-the-case* doctrines in ***Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800**

(1988). The decision is in direct contradiction of this Court's precedents as to the *retroactivity* of new pronouncement of interpretations of law in ***Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994)**; ***Landgraf v. USI Film Products*, 511 U.S. 244. 269 (1994)**; and ***Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993)**. The decision is in direct conflict with the Federal Circuit, the 1st, 7th and 11th Circuits, and this Court with respect to the proper application of the limitations period in 26 U.S.C. §§ 6532(b) and 7405 addressed in ***Stanley v. United States*, 140 F.3d 1023, 1029 (Fed. Cir. 1998)**; ***Clark v. United States*, 63 F.3d 83 (1st Cir. 1995)**; ***O'Bryant v. United States*, 49 F.3d 340, 346 (7th Cir. 1995)**; ***Bilzerian v. United States*, 86 F.3d 1067 (11th Cir. 1996)**. The decisions below disregards this Courts precedence as to the proper application of the limitations period in 26 U.S.C. §§ 6532(b) in ***O'Gilvie v. United States*, 519 U.S. 79 (1996)**.

Most significant is that the Tax Court did not formally rule on the litigation expense issue. However, the Court of Appeals, apparently recognized that the petitioner was entitled to deduct the litigation expenses for 1973 through 1986 from his 1990 income, and that the failure of the respondent and the Tax Court to allow this deduction was clear error, *sua sponte*, ruled that the petitioner had factually been paid the $44,274.00 in litigation expenses he sought to deduct from his 1990 gross income. **(App. A, *infra*, 4a-5a)**. In making its assumptive ruling, the Court of Appeals cited a statement of the U.S. Court of Appeals for the D.C. Circuit in ***Brown v. United States*, 78 F.3d 645, 647 (D.C. Cir. 1996)**. The Sixth Circuit's assumptive ruling is incorrect in that the District Court, citing ***Mitchell v. Secretary of Commerce*, Civ. 82-3020, slip op., (D.D.C., Jan. 10, 1992) (Reported at 1992 U.S.**

Dist. LEXIS 147), specifically declined to award the petitioner expenses to cover the 13 year period on grounds that he was employed by the respondent and that the respondent was judicially responsible for these expenses. See ***Order, Brown v. Marsh*, D.D.C.Civil Action No. 80-1169 (CRR), filed August 20, 1992**; ***Brown v. Marsh*, 707 F.Supp. 21, 22 (D.D.C. 1989).**

In addition to the limitations of the Federal Court Improvement Act, 28 U.S.C. § 1295(a), because the respondent had the Court of Claims (now Court of Federal Claims) declare that the petitioner was not a legal resident of Tennessee or the United States, but a bona fide and legal resident of Offenbach, Germany, ***Brown v. United States*, 5 Cl. Ct. 1, 13-15 (1984)**, proper venue for the appeal of this case was either in the U.S. Court of Appeals for the District of Columbia pursuant to the default provision of 26 U.S.C. § 7482(b)(1), or the Federal Circuit pursuant to 28 U.S.C. § 1295(a)(2).

ASSESSMENT OF INTEREST

On May 22, 1998, the respondent issued the petitioner a Notice of Tax Due on Federal Tax Return in the amount of $81,088.98. The assessment included interest on the money alleged to have been erroneously returned to the petitioner for 1990 under IRC 104(a)(2). The imposition of interest on such money is in contravention of 26 U.S.C. § 6404(e)(2).

IRC § 6404(e)(2) provides that:

– The Secretary shall abate the assessment of all interest on any erroneous refund under section 6602 until the date demand or repayment is made, unless –

(A) the taxpayer (or a related party) has in any way caused such erroneous refund, or

(B) such erroneous refund exceeds $50,000.

Notwithstanding that the basic assessment in this case is an unconstitutional taking, the imposition of interest on the money which was lawfully returned at the time is improper. Moreover, the respondents failure to proceed to reclaim the money returned (*albeit*, lawfully) to the petitioner in the manner mandated by 26 U.S.C. § 6514(a)(3) is fatal.

FEDERAL RULES OF CIVIL PROCEDURE, RULE 60(b)

A Rule 60(b)(6) petition for relief from judgment has been accepted, filed, and is under consideration by the CFC. The questions being whether the facts that no tax deficiency factually existed and that the Commissioner was attempting to reclaim an alleged erroneous refund outside the limitations period in 26 U.S.C. §§ 6532(b), 7405 were "central to the litigation" before the CFC and could not be disregarded (***Computer Professionals for Social Responsibility v. United States Secret Service*, 72 F.3d 897, 902-03 (D.C. Cir. 1996)**), and whether the Tax Court, being a court of limited jurisdiction, had the equitable power to expand its jurisdiction to adjudicate a Tucker Act and tax refund claim. See ***Continental Equities, Inc. v. Commissioner of Internal Revenue*, 551 F.2d 74, 79 (5th Cir. 1977).**

In seeking the extraordinary relief provided by Rule 60(b)(6), the petitioner asked the CFC to recognize that a fraudulent, or materially inaccurate, document cannot lawfully form the basis for a valid judgment in a federal court. Neither can such document confer upon, nor serve to deprive a federal court of its jurisdiction. ***Columbia Bldg. Ltd. v. Commissioner*, 98 T.C. 607, 611 (1992)**, does not hold to the contrary where the jurisdiction of the CFC has already been properly invoked pursuant to 28 U.S.C § 1346(a)(1). The Notice of Deficiency at issue in this case

was not only untimely on its face, but included clearly unlawful, false and fraudulent claims against the petitioner. See, e.g., ***Stonehill v. Commissioner*, 702 F.2d 1288, 1293 (1983); *Helvering v. Taylor*, 293 U.S. 507, 515 (1935).** A taxpayer may not be deprived of his property or any right on basis of such a document.

Petitioner would further ask that the Court recognize that the Tax Court's holding that the Court of Federal Claims erred in its ruling as to the Tax Court's jurisdiction pursuant to 26 U.S.C. §§ 7422(e) and 7459(e), and refusal to give judicial respect to the decision of CFC, as affirmed by the Federal Circuit, violated the clear precedent and "law-of-the-case" mandate of this Court in ***Christianson v. Colt Industries Operating Corp.***, supra. Petitioner asked the Court to take notice that the retroactive application of ***United States v. Burke*, 504 U.S. 229 (1992)**, in this case [the attempted imposition of an $81,088.98 liability] is specifically proscribed by a proper reading of ***Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 315 (1994)**, and ***Landgraf v. USI Film Products*, 511 U.S. 244, 269 (1994)**; and ***Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993)**. (These cases require *courts* to apply the legal principle announced in ***United States v. Burke*, 504 U.S. 229 (1992), *"to all Title VII tax cases pending before them, or open on direct review,"*** on the date *Burke* was announced.).

But for the respondent's characterization of its payments to the petitioner as compensatory damages rather than back wages (See ***Summers v. United States*, 648 F.2d 1324, 1330 (Ct. Cl. 1981)**) in an effort to reclaim the interest due (5 U.S.C. § 5596(b)(2)(A): *"An amount payable under paragraph (1)(A)(i) of this subsection shall be payable with interest."*), there is no question that the payment of back wages to the petitioner, then a federal employee,

under 5 U.S.C. §§ 5332, 5334, 5402, 5404 and 5596 would be taxable if paid today.

REASON FOR GRANTING THE WRIT

This case presents issues of great moment to the public trust. It is one of those cases of the class in which Congress has found it necessary to hold hearings – one in which the IRS has abused its extraordinary powers and judicial relief from standard burden of proof principles.

The decisions below unquestionably violate clear congressional mandates and proscriptions of law. The decision is in direct and flagrant disregard of this Court's precedents relative to application of the *estoppel* and *law-of-the-case* doctrines in ***Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988)**. The decision is in direct contradiction of this Court's precedents as to the *retroactivity* of new pronouncement of interpretations of law in ***Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994)**; ***Landgraf v. USI Film Products*, 511 U.S. 244, 269 (1994)**; and ***Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993)**. The decision is in direct conflict with the Federal Circuit, the 1st, 7th and 11th Circuits, and this Court with respect to the proper application of the limitations period in 26 U.S.C. §§ 6532(b) and 7405 addressed in ***Stanley v. United States*, 140 F.3d 1023, 1029 (Fed. Cir. 1998)**; ***Clark v. United States*, 63 F.3d 83 (1st Cir. 1995)**; ***O'Bryant v. United States*, 49 F.3d 340, 346 (7th Cir. 1995)**; ***Bilzerian v. United States*, 86 F.3d 1067 (11th Cir. 1996)**. The decision below disregards this Courts precedence as to the proper application of the limitations period in 26 U.S.C. § 6532(b) in ***O'Gilvie v. United States*, 519 U.S. 79 (1996)**, and its mandates in ***United States v. Updike***, 281 U.S. 489, 493 (1930), and

Bowers v. N.Y. & Albany Lighterage Co., 273 U.S. 346, 349-350 (1927).

The writ prayed for in this petition should be granted not only because of the flagrant disregard of the precedents of this Court and the fact that the absence of review will result in the clearly unconstitutional taking of private property in an amount which would also infringe upon the petitioner's liberty, but because the decision below leaves unaccounted for thousands of public dollars which were allegedly disbursed from the U.S. Treasury in the name of the petitioner. Further, the absence of review by this Court, would leave unanswered the question as to how, when and why the data systems and records of the IRS were altered to show nonexistent and *"bogus"* payments to petitioner. Also left unanswered would be when, how and why the records and data entries which formed the basis of the respondent's actions against the petitioner were deleted and removed from the federal archives.

In this case, the respondent induced the courts below into entering a judgment in its favor through the use of, what it now admits was, a tainted or fraudulent ("bogus" and "not bona fide" Notice of Deficiency) presentation. Such a judgment, says this Court, cannot stand. ***Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245 (1944).** This is not merely fraud against the petitioner, but is fraud against the public trust and "fraud upon the court." **Id.**

This Court has made clear that Article III courts must enforce federal law and follow its precedents in doing so. In the present case this Court and Congress have ***"directly spoken to the precise question at issue," Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.,***

467 U.S. 837, 842 (1984). The courts below had no authority to inquire beyond this Court's precedents and Congress" legal mandates.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals should be granted. Alternatively, the decisions below should be summarily set aside and the case remanded to the Court of Federal Claims where jurisdiction properly rested.

Respectfully submitted,

July 25, 1999

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Petitioner, *pro se*

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No. 98-1444

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES E. BROWN, Petitioner-Appellant, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	)	ORDER (Filed Apr. 27, 1999)

Before: KEITH, MERRITT, and DAUGHTREY, Circuit Judges.

James E. Brown, a Tennessee resident, appeals pro se a decision of the tax court assessing deficiencies for the years 1990 and 1991. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Brown was a civilian employee of the Army in Germany. He successfully prosecuted an employment discrimination action under Title VII of the Civil Rights Act of 1964, and in 1990 he received a judgment of $137,918.96. Of that amount, $27,118 was withheld for taxes, and some was deposited in Brown's retirement account. Brown claims that he filed a return for 1990 in June, 1991, but the IRS records show that no return was received until July, 1992. Brown characterizes that return as a copy provided pursuant to a request from the IRS. On the return, Brown claimed the Title VII award was

excludable from income, and requested a refund of the taxes withheld. He also claimed deductions for business expenses that could have been reimbursed by his employer. A refund check was sent to Brown in September, 1992, in the amount of $30,045.66. Brown filed a return for 1991, again claiming deductions for business expenses that could have been reimbursed by his employer. Mysteriously, the IRS received information from the Social Security Administration that Brown had also received additional payment on his Title VII action in 1991 from the United States District Court in the amount of $81,669, plus $47,277 which was withheld for taxes. The IRS later determined that this information was incorrect, and no such funds had been disbursed. However, the IRS began auditing Brown's returns, and informed him of this alleged payment.

Brown then filed suit in the Court of Federal Claims, seeking the $81,669 which he had never received, as well as a refund of the taxes reportedly withheld. Before that case was resolved, the IRS issued a notice of deficiency for the tax years 1990 and 1991, on May 12, 1995. This petition was then filed in the tax court to contest the deficiency. Brown contested the deficiency notice on a number of grounds, arguing: 1) the IRS was estopped from assessing a deficiency for 1990 because they had asserted that the statute of limitations had run on that tax year in their argument in the Court of Federal Claims; 2) jurisdiction belonged in the Court of Federal Claims rather than the tax court; 3) the case of *United States v. Burke*, 504 U.S. 229, 242 (1992), which held that Title VII damages were not excludable from income, was being applied retroactively to him; 4) his 1990 return had been

filed in June of 1991, and the two-year statute of limitations for recovering refunds had passed; 5) he should not be assessed an addition to tax for negligence; 6) he was entitled to deduct his reimbursable business expenses; and 7) he was entitled to deduct litigation expenses of $44,275 from his Title VII award.

The tax court denied Brown's motion for summary judgment, rejecting his arguments that jurisdiction belonged in the Court of Federal Claims and that a two-year statute of limitations applied. A hearing was held on the remaining issues. The tax court then entered its decision, assessing a deficiency of $44,086 for 1990, plus an addition to tax under 26 U.S.C. § 6651(a)(1) of $3,799 for filing a late return, and an addition under § 6662(b)(1) of $330 for claiming a deduction (the reimburseable [sic] business expenses) to which he was clearly not entitled, due to negligence or disregard of the regulations. A deficiency of $998.56 was also assessed for the year 1991. This appeal followed. Brown reasserts all of the claims raised below, with the exception of the claim for deducting reimbursable business expenses, which he now concedes.

This court reviews factual findings of the tax court under the clearly erroneous standard, and reviews legal questions de novo. *See Hoover v. C.I.R.*, 102 F.3d 842, 844 (6th Cir. 1996). Brown has demonstrated no error in the tax court's factual findings, and review of the record also shows that the legal issues were properly resolved. The tax court's decision will therefore be affirmed.

Brown initially argues that the IRS is estopped from challenging his argument that the statute of limitations had expired with respect to his 1990 taxes, because it

argued that the statute of limitations had expired in defending Brown's complaint in the Court of Federal Claims. Brown refers to an excerpt from respondent's brief and the decision of the Court, neither of which contain any argument or finding to that effect. Brown's misconstruction of these documents does not estop [sic] the IRS from adopting the position that the statute of limitations has not expired, as it has never taken a contrary position.

Brown next argues that jurisdiction was lacking in the tax court and should have remained with the Court of Federal Claims. However, a notice of deficiency was issued prior to a hearing in the Claims Court, pursuant to 26 U.S.C. § 7422(e), and a petition for review was filed in the tax court, thus depriving the Claims Court of jurisdiction. *See Conklin v. C.I.R.*, 397 F.2d 1027, 1031 (10th Cir. 1990); *Beer v. C.I.R.*, 733 F.2d 435, 436 (6th Cir.) (per curiam), *cert. denied*, 469 U.S. 857 (1984).

Brown argues that the holding of *United States v. Burke*, 504 U.S. 229, 242 (1992), that Title VII damages are not excludable from income, cannot be applied retroactively. This holding was properly applied to this case, as a judicial construction of a statute applies both before and after the court decision. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994).

Brown challenges the finding that his tax return for 1990 was not filed until July, 1992, rather than in June of 1991, as he contends. However, as the return he allegedly filed in 1991 was not received according to the records of the IRS, and he did not send it by registered or certified mail, no proper evidence exists to substantiate his claim.

See Surowka v. United States, 909 F.2d 148, 150 (6th Cir. 1990). Brown argues that repeated correspondence between the IRS and himself following the alleged 1991 filing proves that his return had been received. The only supporting evidence he has submitted is one letter indicating that he requested copies of unspecified returns or W-2 forms. Nothing about this letter implies that a return for 1990 was received by the IRS in 1991. Brown also argues at length that he is being discriminated against because he mailed his return from outside the United States. This argument has no basis. The IRS did not refuse to recognize timely filing because of a foreign postmark or the use of foreign registered or certified mail. There simply was no postmark or registered or certified mail receipt in evidence.

Brown argues that the statute of limitations expired for collection efforts regarding his 1990 taxes. His argument rests on the June 1991 filing date, which is not supported by the evidence, as well as application of a two-year statute of limitations for collecting erroneous refunds, pursuant to 26 U.S.C. § 6532(b). The government contends that a three-year statute for assessing deficiencies applies, pursuant to § 6501(a). Therefore, the May 1995 deficiency notice was timely with regard to the July 1992 filing of the return for 1990. Unfortunately for Brown, the case law shows that the government has the option of proceeding to recover a refund within two years of its issuance, or of filing a notice of deficiency within three years of the filing of a return. *See United States v. Wilkes*, 946 F.2d 1143, 1152 (5th Cir. 1991).

Brown also argues that he should not have been assessed an addition to tax for negligently claiming a

deduction for his reimbursable expenses. A taxpayer has the burden of showing that a finding of negligence is clearly erroneous. *See Leuhsler v. C.I.R.*, 963 F.2d 907, 910 (6th Cir. 1992) Brown's conclusory argument that he was not guilty of negligence does not satisfy this burden.

Finally, Brown argues that he incurred litigation expenses of $44,275 in pursuit of his Title VII claim, which should be deductible from the award. However, he submitted absolutely no evidence of any such expenditures. Moreover, it appears that Brown eventually received an award of attorney fees and expenses in his Title VII action. *See Brown v. Secretary of Army*, 78 F.3d 645, 647 (D.C. Cir.), *cert. denied*, 117 S. Ct. 607 (1996).

For all of the above reasons, the decision of the tax court is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ Illegible
Clerk

UNITED STATES TAX COURT

JAMES E. BROWN, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	Docket No. 10823-95

DECISION

Pursuant to the opinion of the Court filed December 23, 1997, and incorporating herein the facts recited in respondent's computation as the findings of the Court, it is

ORDERED AND DECIDED: That there are deficiencies in income tax due from the petitioner for the taxable years 1990 and 1991, in the amounts of $44,086.00 and $998.56, respectively; and

That there is an addition to the tax due from the petitioner under I.R.C. §6651(a)(1) for the taxable year 1990 in the amount of $3,799.00; and

That there is an addition to the tax due from the petitioner under I.R.C. §6662(b)(1) for the taxable year 1990 in the amount of $330.00.

(Signed) Carolyn Miller Parr
Judge.

Entered: MAR 10 1998

* * *

T.C. Memo. 1997-567

UNITED STATES TAX COURT

JAMES E. BROWN, Petitioner *v.*
COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 10823-95. Filed December 23, 1997.

James E. Brown, pro se.

Rebecca Dance Harris, for respondent.

MEMORANDUM OPINION

PARR, *Judge*: Respondent determined deficiencies in, an [sic] addition to, and a penalty on, petitioner's Federal income taxes as follows:

Year	Deficiency	Additions to Tax Sec. 6651	Penalties Sec. 6662
1990	$44,086	$3,799	$330
1991	$26,406	–	–

All section references are to the Internal Revenue Code in effect for the taxable years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure, unless otherwise indicated.

After a concession[1], the issues for decision are:[2] (1) Whether the theory of judicial estoppel, or in the alternative, the period of limitations, bars the assessment and collection of the deficiency in income tax for 1990. We

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[1] Respondent concedes that petitioner did not have unreported income of $81,669 in 1991.

[2] Petitioner raises several issues at trial and on brief which we find to be without merit. Accordingly, we do not address them here.

hold it does not. (2) Whether petitioner's backpay award of $137,918.96 received in 1990 as partial settlement of his claim under Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 253, is taxable. We hold it is. (3) Whether petitioner is entitled to an overpayment based on his claim to additional withholding credits of $47,277 for 1991. We hold he is not. (4) Whether petitioner is entitled to deduct unreimbursed employee business expenses of $8,044 and $5,457 for 1990 and 1991, respectively. We hold he is not. (5) Whether for 1990 petitioner is liable for an addition to tax for failure to file a return under section 6651(a). We hold he is. (6) Whether for 1990 petitioner is liable for an accuracy-related penalty for negligence under section 6662. We hold he is.

Some of the facts have been stipulated and are so found. The stipulated facts and the accompanying exhibits are incorporated into our findings by this reference. At the time the petition in this case was filed, petitioner's legal residence was Whites Creek, Tennessee.

General Background

Petitioner is a civilian employee of the U.S. Department of the Army (the Army). On May 8, 1980, petitioner initiated a lawsuit in the U.S. District Court for the District of Columbia (the District Court) against the Secretary of the Army alleging, among other things, that he was discriminated against by the Army in violation of Title VII of the Civil Rights Act of 1964 (the Title VII claim) when he was denied certain promotions.

On May 12, 1988, the District Court granted petitioner's motion for partial summary judgment on the

issue of the Army's liability under the Title VII claim. On May 11, 1989, the District Court entered an order granting petitioner certain backpay awards in accordance with its May 12, 1988 decision. In accordance with the May 11, 1989 order of the District Court, petitioner received an interim gross pay award of $137,918.96 during 1990.

On his Federal income tax return for 1990, petitioner reported that he received an award based on the Title VII claim, but assumed the position that it was not taxable. Petitioner's 1990 return was first received at respondent's Brookhaven Service Center on July 1, 1992 and forwarded to the Philadelphia Service Center for processing. A second return for 1990, which respondent treated as an amended return, was received on July 6, 1992 at the Philadelphia Service Center. In September 1992 petitioner received a refund of $30,045.66 for 1990.

Respondent then received an information item for 1991 indicating that a Form W-2 was issued to petitioner by the District Court. The Form W-2 indicated that for 1991 petitioner had received additional income of $81,669 and withholding credits of $47,277 in further satisfaction of the Title VII claim. Upon further review, however, the Form W-2 was found not to be a bona fide document, and the parties agreed that petitioner did not receive an additional $81,669 of income.

On April 7, 1994, petitioner filed a complaint in the U.S. Court of Federal Claims (the Court of Federal Claims) seeking to recover the amount allegedly paid to him in 1991 and the amount allegedly withheld for that year. On May 12, 1995, after petitioner filed suit in the Court of Federal Claims, respondent issued the notice of

deficiency for 1990 and 1991. In response to the notice of deficiency, petitioner filed a petition with the Court, thus vesting the Court with jurisdiction over the case. See *Brown v. Commissioner*, T.C. Memo. 1996-100.

Issue 1. Period of Limitations

Respondent determined a deficiency in petitioner's income tax of $44,086 for 1990. Petitioner asserts that respondent is precluded from assessing this deficiency by the theory of judicial estoppel, or in the alternative, by the expiration of the period of limitations.

We are not persuaded by petitioner's arguments. The doctrine of judicial estoppel, petitioner argues, operates to preclude a party from asserting a position in legal proceedings which is contrary to a position it has already asserted in another proceeding. See *Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1217-1220 (6th Cir. 1990).

Petitioner maintains that in proceedings before the Court of Federal Claims the Government conceded that the statute of limitations barred any assessment of a deficiency for 1990. Petitioner claims that the Government asserted this as a basis for having his suit before the Court of Federal Claims dismissed, and is now prohibited from asserting a contrary position before the Court.

At trial, respondent denied that the Government made such a concession during the proceedings before the Court of Federal Claims. In support of his contention, petitioner introduced at trial a portion of the Government's brief from the case before the Court of Federal Claims. The brief made no such concession. On brief,

petitioner cites the opinion of the Court of Federal Claims to establish this same point. In no conceivable way does the opinion of the Court of Federal Claims support petitioner's position. See *Brown v. United States*, Nos. 94-227C & 94-358C at 4-5 (Fed. Cl. Feb. 22, 1996). Accordingly, respondent is not judicially estopped from assessing the deficiency for 1990.

In the alternative, petitioner argues that respondent is precluded from asserting a deficiency for 1990 by the statute of limitations. At trial, petitioner referred on occasion to the "2-year" statute of limitations. We addressed the distinction between the statutes of limitations for deficiency proceedings and suits for the recovery of erroneous refunds in our previous opinion denying petitioner's motion for summary judgment, *Brown v. Commissioner*, T.C. Memo. 1996-100.

A suit for the recovery of an erroneous refund under section 7405 is merely one of several remedies open to the Government in such a situation. *Krieger v. Commissioner*, 64 T.C. 214, 216 (1975). It is a civil action brought in the name of the United States and does not preclude an alternative remedy; namely, the determination of a deficiency by the Commissioner. *Id.* It has been firmly established in our tax law that the Commissioner may proceed through the deficiency route where there has been an erroneous refund as in this case. *Pesch v. Commissioner*, 78 T.C. 100, 120 (1982); *Krieger v. Commissioner, supra; Beer v. Commissioner*, T.C. Memo. 1982-735, affd. 733 F.2d 435 (6th Cir. 1984); see also *Burnet v. Porter*, 283 U.S. 230 (1931); *Miller v. Commissioner*, 23 T.C. 565 (1954), affd. 231 F.2d 8 (5th Cir. 1956); H. Rept. 849, 79th Cong., 1st Sess. (1945), 1945 C.B. 566, 583. When the Commissioner resorts to the

deficiency procedure, it is clear that the period of limitations applicable to such course of action, i.e., section 6501, is controlling rather than the 2-year period applicable to suits for the recovery of erroneous refunds. *Pesch v. Commissioner, supra; Krieger v. Commissioner, supra.*

This case is before the Court pursuant to the issuance of a notice of deficiency by respondent and petitioner's timely filing of a petition. Under the general rule of section 6501(a), a deficiency must be assessed within 3 years from the date on which the return is filed. The notice of deficiency was issued on May 12, 1995. Respondent determined that petitioner filed his 1990 return on July 1, 1992. Petitioner asserts that he filed his 1990 return on June 6, 1991. The statute of limitations, therefore, turns on when the return is deemed filed.

Filing, generally, "is not complete until the document is delivered and received." *United States v. Lombardo,* 241 U.S. 73, 76 (1916). This general presumption, however, is modified by section 7502. Section 7502(a) (1) provides that if a document is delivered to the Internal Revenue Service (IRS) at the proper address after its due date by U.S. mail, then in certain circumstances the date of postmark shall be the date of delivery. Section 7502(c) and accompanying regulations provide that use of registered mail or certified mail provides prima facie evidence that the document was delivered, and that the date of registration or the date of the U.S. postmark on the certified mail receipt is the postmark date. Here, petitioner has not offered any evidence of postmark. In addition, petitioner

did not take the added and, in this case, necessary precaution of having it sent by registered or certified mail.[3]

Notwithstanding section 7502, when a taxpayer does not have documentary evidence that a form was mailed, we, and certain other federal courts, have in particular circumstances allowed indirect evidence to prove that the form was mailed. See *Estate of Wood v. Commissioner*, 92 T.C. 793 (1989), affd. 909 F.2d 1155 (8th Cir. 1990); see also *Anderson v. United States*, 966 F.2d 487 (9th Cir. 1992). It is well settled that pursuant to the common law mailbox rule, proper mailing of an envelope creates a rebuttable presumption of receipt. *Rosenthal v. Walker*, 111 U.S. 185, 193-194 (1884); *Smith v. Commissioner*, T.C. Memo. 1994-270, affd. without published opinion 81 F.3d 170 (9th Cir 1996). Whether the Commissioner is able to rebut such presumption of receipt is a credibility determination. *Smith v. Commissioner, supra* (citing *Anderson v. United States, supra* at 492). We need not make such a credibility determination here.[4]

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[3] Petitioner did provide a certified mail receipt dated June 23, 1992, for a document sent to the IRS in Philadelphia, Pennsylvania, a year later than petitioner claims he filed his original return.

[4] Even if we were required to make such a determination, we note that petitioner's case is distinguishable from those which allowed extrinsic evidence as proof of the date of mailing. In *Estate of Wood v. Commissioner*, 92 T.C. 793 (1989), affd. 909 F.2d 1155 (8th Cir. 1990), for example, the taxpayer provided testimony from the local postmaster as to the date she hand-postmarked the item. Petitioner does not provide such evidence here. In rebuttal, however, respondent provided credible testimony from an employee regarding standard IRS procedures, and a nationwide search on respondent's computer

The Court of Appeals for the Sixth Circuit, to which this case is appealable, has consistently rejected "testimony or other evidence as proof of the actual date of mailing." *Miller v. United States*, 784 F.2d 728, 731 (6th Cir. 1986) (quoting *Deutsch v. Commissioner*, 599 F.2d 44, 46 (2d Cir. 1979)). The Court of Appeals for the Sixth Circuit "[concluded] that the only exceptions to the physical delivery rule available to taxpayers are the two set out in section 7502". *Miller v. United States, supra* at 731.

This issue was revisited in *Surowka v. United States*, 909 F.2d 148, 150 (6th Cir. 1990), where the Court of Appeals stated:

> Plaintiffs argue that the recent tax court decision in *Estate of Wood v. Commissioner of Internal Revenue*, 92 T.C. 793 (1989) allows them to prove timely filing of their return by extrinsic evidence. We disagree.
>
> First, the tax court in *Wood*, unlike this court in *Miller*, found the judicially-created presumption, that proof of a properly mailed document is received, applied in section 7502 cases. 92 T.C. 798-99. Further, the tax court's holding in *Wood* that section 7502(c) creates a "safe harbor" for taxpayers who file by registered or certified mail was rejected by this court in *Miller*. 784 F.2d at 731. More importantly, the tax court in *Bruder v. Commissioner*, 57 T.C.M. 873 (1989), held that *Wood*'s presumption of delivery did not apply to cases appealable to the Sixth Circuit because, in *Miller*. the Sixth Circuit rejected the applicability of any such presumption and held that section

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system determined no return was received from petitioner prior to July 1, 1992.

7502 creates the only exceptions to the physical delivery rule, 57 T.C.M. at 874.

The Court of Appeals for the Sixth Circuit again confirmed that the exceptions provided in section 7502 are the only ones to the rule of actual physical delivery. *Carroll v. Commissioner*, 71 F.3d 1228 (6th Cir. 1995), affg. T.C. Memo. 1994-229. Here, petitioner has failed to show that section 7502 applies. Accordingly, petitioner's return is deemed filed on July 1, 1992, thus making the notice of deficiency timely.

Issue 2. Backpay Award

Respondent determined that the $137,918.96 petitioner received in 1990 as partial settlement of the Title VII claim is taxable. Petitioner asserts that this amount received relating to the Title VII claim is excludable from his gross income.

In *United States v. Burke*, 504 U.S. 229, 242 (1992), the Supreme Court held that backpay awards received in settlement of Title VII discrimination claims were not excludable from gross income under section 104(a) (2). The Supreme Court noted that "Congress declined to recompense Title VII plaintiffs for anything beyond the wages properly due them – wages that, if paid in the ordinary course, would have been fully taxable." *Id.* at 241.

Petitioner argues that respondent cannot apply Burke retroactively. We disagree.

Section 104(a) (2), as it relates to the Title VII claim, was in effect when respondent mailed the notice of deficiency to petitioner, and the Supreme Court's holding in Burke construed but did not change that existing law. In addition, the Supreme Court has held:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 97 (1993); accord *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991).

The rule announced by the Supreme Court in *United States v. Burke, supra*, must, therefore, be given full retroactive effect to any open cases. Accordingly, the $137,918.96 of backpay petitioner received as partial settlement of the Title VII claim is taxable income for 1990.

Issue 3. Withholding Credits

Respondent determined that petitioner is not entitled to additional withholding credits of $47,277 for 1991. Petitioner asserts that he is entitled to an overpayment based on his claim to such withholding credits.

This adjustment originates from an information item reported to the IRS. Specifically, the IRS received information that a Form W-2 was issued to petitioner by the District Court reflecting an additional $81,669 of income and withholding credits of $47,277 in further satisfaction

of his Title VII claim. Upon further review, it was discovered that the Form W-2 was not issued by the District Court and was not a bona fide document. Respondent concedes that petitioner did not receive the additional $81,669. Furthermore, the District Court did not remit $47,277 to the IRS on behalf of petitioner.

For purposes of additional income, petitioner accepts that the District Court did not issue the Form W-2 and that he did not receive the $81,669. Notwithstanding this, petitioner asserts that he is still entitled to the $47,277 of withholding credits and attempted to claim a refund based on them. Petitioner has offered no documentation that $47,277 was paid to the IRS on his behalf for 1991. Accordingly, petitioner is not entitled to an overpayment based on his claim to withholding credits of $47,277 for 1991.

Issue 4. Unreimbursed Employee Business Expenses

Respondent determined that petitioner is not entitled to a deduction for unreimbursed employee business expenses of $8,044 and $5,457 for 1990 and 1991, respectively. Petitioner asserts that he is entitled to the deductions.

Section 162(a) allows a deduction for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business". Such deductions, however, are not allowable to an employee "to the extent that the employee is entitled to reimbursement from his or her employer for an expenditure related

to his or her status as an employee." *Lucas v. Commissioner*, 79 T.C. 1, 7 (1982).

At trial, petitioner testified that he "could have received a 100-percent reimbursement from the Government" for these expenses. In addition, petitioner failed to substantiate that he incurred these expenses in the amounts claimed. Accordingly, since petitioner could have been reimbursed by his employer and did not substantiate these deductions, he is not entitled to unreimbursed employee business deductions of $8,044 and $5,457 for 1990 and 1991, respectively.

Issue 5. Addition to Tax Under Section 6651(a)

Respondent determined an addition to tax under section 6651(a) for delinquent filing of a return.

Section 6651(a) provides that if a taxpayer fails to file a return by its due date, including extensions of time for filing, there shall be an addition to tax equal to 5 percent of the tax required to be shown on the return for each month the failure to file continues, not to exceed 25 percent.

Petitioner had an extension until June 15, 1991, to file his 1990 return. Petitioner did not file his 1990 return until July 1, 1992. Petitioner has failed to meet his burden on this issue. Rule 142(a); *Welch v. Helvering*, 290 U.S. 111, 115 (1933). Accordingly, respondent's addition to tax on this issue is sustained.

Issue 6. Penalty Under Section 6662(b)

Respondent determined that the portion of the underpayment for 1990 attributable to the disallowance of the unreimbursed employee business expenses was due to negligence.

Section 6662 provides for an accuracy-related penalty equal to 20 percent of the portion of the underpayment due to negligence. For purposes of section 6662, negligence "includes any failure to make a reasonable attempt to comply with the * * * [income tax laws]" and disregard "includes any careless, reckless, or intentional disregard."

As a general rule, the Commissioner's determinations are presumed correct, and the taxpayer bears the burden of proving otherwise. Rule 142(a); *Welch v. Helvering, supra*. Petitioner did not address this penalty at trial or on brief and has therefore failed to meet his burden with respect to this issue. Accordingly, the penalty under section 6662 is sustained.

For the foregoing reasons, and to take account of a concession,

Decision will be entered under Rule 155.

This opinion/order will not be published in the Federal Claims Reporter because it does not add significantly to the body of law and is not of widespread interest.

In the United States Court of Federal Claims

Nos. 94-227C & 94-358C

(Filed February 22, 1996)

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cases and by plaintiff's failure to cite a proper money-mandating statute. In addition, defendant moves to dismiss under **RCFC** 12(b)(4) for failure to state a claim upon which relief can be granted, arguing that the doctrine of *res judicata* precludes further litigation on plaintiff's claims. Plaintiff, James E. Brown, responds by arguing that the court has jurisdiction over the subject matter and may grant the relief he requests. In addition, plaintiff moves for summary judgment under **RCFC** 56.

Factual Background

The matters before the court concern two consolidated cases, Nos. 94-227C and 94-358C. Case No. 94-227C involves a claim for back pay. On October 31, 1985, the Equal Opportunity Employment Commission (EEOC) found that plaintiff had been subjected to unlawful retaliation for filing discrimination complaints against defendant in violation of Title VII of the Civil Rights Act. The United States District Court for the District of Columbia found that the Army was bound by the EEOC's decision.[1] Finding in favor of plaintiff, the district court ordered defendant to determine the amount due plaintiff. The Army found that plaintiff was entitled to $234,228. Plaintiff believed that he was due more money, including $30,333 in overseas housing allowances and $44,275 in legal expenses. On October 4, 1990, the district court ordered a partial payment in the amount of $137,918.96.[2]

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[1] ***Brown v. Marsh***, 729 F. Supp. 864, 867-868 (D.D.C. 1989); Def. App. at Tab D.

[2] There is some confusion as to the exact figures requested and rewarded in this case. For example, the district court

After making this payment, defendant apparently recalculated the total damages and arrived at a figure that was lower than the $137,918.96 that it had already paid.[3] Defendant allegedly withheld further payments as a result of this recalculation.

On his 1990 tax return, plaintiff disclosed the payment of damages but did not include it as income. On March 8, 1994, after examining this return, the Internal Revenue Service (IRS) informed plaintiff that Title VII damages are includable as income. Based on this error, the IRS proposed assessing a deficiency. In addition, the IRS examined plaintiffs 1991 tax liability and found evidence suggesting that plaintiff had received an additional $128,946 in that year for his Title VII damages. The IRS had evidently received a portion of this award in the amount of $47,277. Plaintiff claims that he never received the additional payment. On May 12, 1995, after plaintiff had filed suit in this court, the IRS issued a Notice of Deficiency regarding plaintiff's 1990 and 1991 taxes. The IRS retained the $47,277 as partial satisfaction of this deficiency. In response to this deficiency notice, plaintiff

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ordered defendant to pay $137,918.96. Def. App. at Tab F. An attachment to plaintiff's complaint, however, suggests that defendant paid either $138,432.56 or $138,432.55. Compl. at Ex. A (Fed. Cl. Apr. 7, 1994) (containing plaintiff's Petition for Disbursement of Funds Due from the United States). For purposes of addressing the motions before the court, the precise amounts are of no consequence.

[3] Defendant supposedly recalculated damages using Title VII of the Civil Rights Act rather than the Back Pay Act. Under defendant's recharacterization, plaintiff was only entitled to $125,316.

filed a petition in the Tax Court on June 20, 1995, contesting his tax liability for both 1990 and 1991.

Before this court, plaintiff seeks the $128,946 that he allegedly received in 1991 as additional payment for his Title VII damages. In addition, plaintiff seeks the overseas housing allowances and expenses that were not included in defendant's damage calculations. Plaintiff also requests that the court declare a "settlement" of his 1990 tax liability and award interest on all outstanding payments. After receiving the May 12, 1995, Notice of Deficiency, plaintiff amended his complaint to include a request for the $47,277 withheld by the IRS.

The facts in case No. 94-358C involve a reduction in force (RIF) by the Department of the Army. On May 18, 1992, plaintiff received a RIF notice indicating that defendant was abolishing his current position, which had a grade of GM-14 with commensurate salary.[4] In lieu of separation, plaintiff was offered a lower graded position (GS-12), although defendant indicated that plaintiff was entitled to maintain his old grade and pay at this new position. On May 20, 1992, plaintiff accepted the new position. During the RIF proceedings, defendant decided that plaintiff's GM-14 position and salary level had only been temporary. As a result, defendant concluded that, as

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[4] Once again, the exact amounts at issue are unclear. Plaintiff's complaint alleges that he received a salary of $65,036 per year. Compl. at ¶ 2. Plaintiff's proposed findings of uncontroverted facts, however, claim a salary of $65,035. The RIF notice indicates that plaintiff's salary was $64,124. Def. App. at Tab R (Fed. Cl. Mar. 3, 1995). As with the facts in case No. 94-227, the court need not determine the exact amount for purposes of rendering a decision on the motions.

of August 1, 1992, plaintiff was only entitled to retain a grade, of GM-13 and annual pay of $60,070. Plaintiff appealed this action to the Merit System Protection Board (MSPB) on February 10, 1993, claiming that the August 1, 1992, reduction in pay and grade was improper because defendant failed to provide advance notice. In its June 11, 1993, decision, the MSPB found that it had jurisdiction over plaintiff's reduction in grade by the RIF, but his appeal was untimely.[5] As for plaintiff's reduction in pay, the MSPB found that the Office of Personnel Management (OPM) had jurisdiction over that matter. Therefore, the MSPB dismissed plaintiff's appeal. On February 17, 1994, the Court of Appeals for the Federal Circuit affirmed the MSPB's decision.[6] The OPM also reviewed plaintiff's reduction in pay claims and dismissed them on April 13, 1994. Plaintiff filed suit in this court on May 31, 1994, once again challenging his reduction in grade and pay.

Discussion

I. Damage Claims and Tax Liability Claims

In ruling on a motion to dismiss for lack of subject matter jurisdiction under **RCFC** 12(b)(1), the court must accept as true the complaint's undisputed factual allegations and should construe them in a light most favorable to the plaintiff. ***Scheuer v. Rhodes***, 416 U.S. 232, 236 (1974); ***Hamlet v. United States***, 873 F.2d 1414, 1415 (Fed. Cir. 1989); ***Reynolds v. Army & Air Force Exch. Serv.***, 846 F.2d 746, 747 (Fed. Cir. 1988). If the undisputed facts

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[5] Def. App. at Tab A, pp. 3-4.

[6] Def. App. at Tab B.

reveal any possible basis on which the non-moving party might prevail, the court must deny the motion. ***Scheuer***, 416 U.S. at 236; ***W.R. Cooper Gen. Contractor, Inc. v. United States***, 843 F.2d 1362, 1364 (Fed. Cir. 1988). If the motion challenges the truth of the jurisdictional facts alleged in the complaint, however, the court may consider relevant evidence in order to resolve the factual dispute. ***Rocovich v. United States***, 933 F.2d 991, 994 (Fed. Cir. 1991). Plaintiff bears the burden of establishing subject matter jurisdiction. ***KVOS, Inc. v. Associated Press***, 299 U.S. 269 (1936); ***Rocovich***, 933 F.2d at 993. In case No. 94-227C, defendant claims that the Tax Court, rather than this court, has jurisdiction over the subject matter. Moreover, defendant asserts that plaintiff's claims are not properly based on a money-mandating statute.

A. Tax Court Jurisdiction

With regard to the tax claims in case No. 94-227C, defendant argues that this court lost jurisdiction once plaintiff filed a petition in the Tax Court on June 20, 1995, contesting the Notice of Deficiency. Plaintiff argues that this court may properly exercise jurisdiction because the notice of deficiency is invalid.

Plaintiff contends that this court has jurisdiction over its claims under 28 U.S.C. § 1346(a)(1), which grants the Court of Federal Claims the authority to hear cases involving the recovery of taxes:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

> (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

Nevertheless, under certain circumstances, such as those described in 26 U.S.C. § 7422(e) (1994), this court may lose jurisdiction over cases involving the recovery of taxes:

> (e) Stay of proceedings – If the Secretary prior to the hearing of a suit brought by a taxpayer in a district court or the United States [Court of Federal Claims] for the recovery of any income tax, estate tax, gift tax, or tax imposed by chapter 41, 42, 43, or 44 (or any penalty relating to such taxes) mails to the taxpayer a notice that a deficiency has been determined in respect of the tax which is the subject matter of taxpayer's suit, the proceedings in taxpayer's suit shall be stayed during the period of time in which the taxpayer may file a petition with the Tax Court for a redetermination of the asserted deficiency, and for 60 days thereafter. If the taxpayer files a petition with the Tax Court, the district court or the United States [Court of Federal Claims], as the case may be, shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund.

Thus, under § 7422(e), if: (1) the Secretary of the Treasury issues a notice of deficiency before the Court of Federal Claims holds a hearing on the tax matters; and, (2) the

taxpayer files a petition with the Tax Court, this court loses jurisdiction over those tax matters.

Case No. 94-227C contains two tax claims. Plaintiff seeks: (1) a determination of his tax liability for 1990; and, (2) the $47,277 withheld from the additional Title VII damage payment allegedly received in 1991. Plaintiff, however, has also included claims for legal fees, overseas housing allowances, and further compensation for Title VII violations. Although these claims have tax implications, they do not seek the recovery of taxes. Rather, they seek further compensation from Title VII violations and cannot rely on 28 U.S.C. § 1346(a)(1) for jurisdiction. Furthermore, while § 1346(a)(1) arguably grants jurisdiction over the two tax matters, this court lost jurisdiction when plaintiff filed a petition in the Tax Court on June 20, 1995, contesting the deficiencies for both 1990 and 1991.

Plaintiff attempts to avoid this conclusion by arguing that the IRS failed to issue the notice of deficiency within the statute of limitations period. Plaintiff concludes that the Tax Court lacks jurisdiction and, therefore, could not oust the Court of Federal Claim's jurisdiction. An untimely deficiency, however, will not deny the Tax Court of jurisdiction. ***Columbia Bldg., Ltd. v. Commissioner***, 98 T.C. 607, 611 (1992). The Internal Revenue Code itself provides that finding a statute of limitations bar against a deficiency assessment does not deny the Tax Court of jurisdiction. Rather, such a finding is treated as a "decision that there is no deficiency in respect of such tax." 26 U.S.C. § 7459(e). Thus, when a taxpayer raises this issue, the Tax Court will still address the merits of the case. ***Columbia***, 98 T.C. at 611. (citing ***Badger Materials, Inc. v.***

Commissioner, 40 T.C. 1061, 1063 (1963)). Therefore, the Tax Court properly has jurisdiction.

Furthermore, the Tax Court's jurisdiction covers the entire gamut of possible issues that affect the taxpayer's liability for the particular years at issue. ***Erickson v. United States***, 309 F.2d 760, 767 (Ct. Cl. 1962). The notice of deficiency and plaintiff's petition to the Tax Court address plaintiff's liability for 1990 and 1991. Thus, the Tax Court has jurisdiction over plaintiff's tax liability for those years, including whether plaintiff received an additional payment of $128,946. This issue may also resolve whether plaintiff has already received the legal expenses and overseas housing allowances as a part of that additional payment. Therefore, the Tax Court has jurisdiction over these matters as well. Given the extent to which the Tax Court has acquired jurisdiction over the matters raised in case No. 94-227C, this court has lost jurisdiction over all of the claims in that case. 26 U.S.C. § 7422(e).

B. Proper Statute

Defendant argues that plaintiff faces another jurisdictional hurdle in case No. 94-227C because he has failed to base his claims on an appropriate money-mandating statute. Plaintiff alleges that his cause of action arises under: (1) Title VII of the Civil Rights Act; (2) the Back Pay Act; (3) regulations issued by the OPM and the EEOC; and, (4) the Internal Revenue Code.

Under the Tucker Act, this court has "jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act

of Congress or any regulation of an executive department, or upon any express or implied contract with the United States. 28 U.S.C. § 1491(a)(1) (1994). Hence, absent congressional consent to entertain a claim against the United States, this court lacks authority to grant relief. ***United States v. Testan***, 424 U.S. 392, 399 (1976).

The Tucker Act, however, is "only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." ***Id.*** at 398. Therefore, in addition to showing that this court can exercise jurisdiction pursuant to the Tucker Act, plaintiff must also cite a provision of law which can be construed as mandating compensation. ***United States v. Mitchell***, 445 U.S. 535, 538 (1980). Accordingly, the court must examine the statute and regulations cited by plaintiff to determine if he has alleged a proper basis for jurisdiction.

1. Title VII

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e-2000e-17, is the comprehensive, exclusive, and preemptive remedy for federal employees alleging discrimination. ***Brown v. General Serv. Admin.***, 425 U.S. 820, 829 (1976); ***Fausto v. United States***, 16 Cl. Ct. 750, 752-53 (1989). Section 2000e-5(f)(3) grants the United States district courts exclusive jurisdiction to hear Title VII cases. ***Id.; Jones v. United States***, 17 Cl. Ct. 78, 83 (1989). Indeed, plaintiff based his cause of action before the District Court for the District of Columbia on this

statute. Based on the district court's exclusive jurisdiction, however, Title VII cannot be the basis for recovery before this court.

2. Back Pay Act

As an alternative basis for recovery, plaintiff claims that his cause of action arises under the Back Pay Act, 5 U.S.C. § 5596 (1994). This act provides back pay to certain federal employees who suffer unjustified personnel action. Section 5596(b)(1) describes an eligible recipient as:

> [a]n employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee. . . .

Plaintiff claims that the EEOC is an "appropriate authority" under the act and bases his case on the EEOC's finding that he had been affected by an unwarranted personnel action. Plaintiff, however, used this EEOC finding in support of its Title VII claim before the District Court for the District of Columbia. Plaintiff is, in fact, seeking to enforce the judgment by that court and perhaps recover amounts in addition to those granted by the district court. Thus, plaintiff is essentially asking this court to assume jurisdiction over a claim for back pay

based upon alleged violations of Title VII. As discussed in part II(B)(1) above, this court has no such jurisdiction. *See Jones*, 17 Cl. Ct. 78, 82-83 (finding that the complaint alleging jurisdiction under Back Pay Act based on an EEOC decision was effectively based on Title VII).

3. Regulations

Plaintiff also attempts to base his cause of action on OPM and EEOC regulations. While the Tucker Act allows claims founded upon regulations, the regulations must be those of an executive department. In defining the term "executive departments, Title 5, § 101 lists only cabinet level departments. Because neither the OPM nor the EEOC are listed, their regulations do not support jurisdiction under the Tucker Act. *See also* ***Fausto***, 16 Cl. Ct. at 754 (finding that the OPM is not an executive department and the OPM's regulations did not confer jurisdiction); ***Jones***, 17 Ct. Cl. at 82 (finding that the EEOC's regulations did not support jurisdiction).

4. Internal Revenue Code

While provisions in the Internal Revenue Code are proper money-mandating statutes under the Tucker Act, they only support claims for the recovery of taxes. As stated in part A, while case No. 94-227C contains tax claims, plaintiff has also included claims for legal fees, overseas housing allowances, and further compensation for Title VII violations. Although these claims have tax implications, they do not seek the recovery of taxes. Rather, they seek further compensation from Title VII violations. Therefore, plaintiff's failure to base these

claims on a proper statute provide further support for dismissing these claims for lack of jurisdiction.

C. Res Judicata

As an additional basis for dismissing plaintiff's claims in case No. 94-227C, defendant asserts that plaintiff fails to state a claim upon which relief can be granted. Defendant argues that plaintiff has already litigated these claims before the District Court for the District of Columbia and is therefore barred from relitigation under the doctrine of *res judicata*. Plaintiff, on the other hand, characterizes its claims as tax claims over which the district court could not exercise jurisdiction. Further, plaintiff argues that the district court made a mistake in determining damages. Therefore, plaintiff concludes that the district court decision could have no effect on the claims before this court.

The court will dismiss plaintiff's case for failure to state a claim upon which relief may be granted only if it appears beyond a doubt that plaintiff has not alleged facts sufficient to support its claim. ***Conley v. Gibson***, 355 U.S. 41, 45-46 (1957); ***Mostowy v. United States***, 966 F.2d 668, 672 (Fed. Cir. 1992). In ruling on a motion to dismiss under **RCFC** 12(b)(4), the court must accept as true the complaint's undisputed factual allegations and should construe them in a light most favorable to the plaintiff. ***Papasan v. Allain***, 478 U.S. 265, 283 (1986) (citing ***Scheuer***, 416 U.S. at 236); ***Gould, Inc. v. United States***, 935 F.2d 1271, 1274 (Fed. Cir. 1991). Furthermore, all that is required to withstand a motion to dismiss is " 'a short

and plain statement of the claim' that will give the defendant fair notice of what plaintiff's claim is and the grounds upon which it rests." ***Gould***, 935 F.2d at 1276 (citing ***Conley***, 355 U.S. at 47 (footnote omitted)).

Under the doctrine of *res judicata*, a final judgment made by a competent court on a cause of action is a complete bar and is conclusive on that claim when raised in a subsequent suit in which the identity of the parties is the same. ***International Order of Job's Daughters v. Lindeburg & Co.***, 727 F.2d 1087, 1091 (Fed. Cir. 1984); ***Golderg v. United States***, 15 Cl. Ct. 513, 517 (1988). This doctrine also bars any causes of action that should have been raised before the prior court. ***Brown v. United States***, 3 Cl. Ct. 31, 41 (1983), *aff'd*, 741 F.2d 1374 (Fed. Cir. 1984). Moreover, even an erroneous decision will bar plaintiff's cause of action. ***United States v. Sioux Nation of Indians***, 518 F.2d 1298, 1306 (Ct. Cl.), *cert. denied*, 423 U.S. 1016 (1975). 'The purpose of *res judicata* is to promote reliance on judicial decisions, prevent vexatious litigation, and permit courts to resolve other pending suits being litigated for the first time. ***Brown***, 3 Cl. Ct. at 41.

Before the district court, plaintiff sought damages against defendant for violations of Title VII of the Civil Rights Act. The district court addressed the merits of plaintiff's claim, including the amount of damages due plaintiff, attorney's fees, and overseas expenses.[7] While

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[7] The district court addressed the facts involving the violations of the Civil Rights Act in ***Brown v. Marsh***, 729 F. Supp. 864 (D.D.C. 1988); Def. App. at Tab D. Attorney's fees issues appear in ***Brown***, 707 F. Supp. 21 (D.D.C. 1989); Def. App. at Tab H; and in an unpublished order of August 20, 1992,

plaintiff raises tax issues in the present action, plaintiff also concedes that he is seeking money due under a judgment by the district court. Therefore, there are claims for which relief cannot be granted by operation of *res judicata*, in addition to jurisdictional problems, the plaintiff's claims for legal fees, overseas housing allowances, and further compensation. Plaintiff's claim that the district court erred in determining overseas expenses does not change the court's conclusion. ***Sioux Nation***, 518 F.2d at 1306. If plaintiff felt the district court decision was in error, his proper remedy was to seek review on appeal.

II. Reduction in Force Claims

In case No. 94-358C, plaintiff seeks a grade increase and back pay as damages resulting from improper procedures followed during the August 1, 1992, RIF action. Defendant moves to dismiss for failure to state a claim upon which relief can be granted, arguing that plaintiff's claim was already addressed by the MSPB and the United States Court of Appeals for the Federal Circuit. Defendant concludes, based on the doctrine of *res judicata*, that this court cannot revisit the claim. Plaintiff, on the other hand, claims that the MSPB lacked jurisdiction over its claims and asserts that this court may not only address the merits but also grant summary judgment in plaintiff's favor.

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reproduced at Def. App. at Tab I. Further, the district court confronted the issue of overseas housing expenses in its opinion of August 28, 1992. Def. App. at Tab K.

A. Subject Matter Jurisdiction

Although defendant focuses on the effect of *res judicata* on plaintiff's claims, the fact that the MSPB has ruled on some of the issues before the court, combined with the Federal Circuit's affirmation of the MSPB's decision, raise questions about this court's jurisdiction. The court may consider this matter *sua sponte*. ***Hafen v. United States***, 30 Fed. Cl. 470, 472 (1994), *affd*, 47 F.3d 1183 (Fed. Cir. 1995).

In ***United States v. Fausto***, 484 U.S. 439 (1988), the Supreme Court stated that, when Congress enacted the Civil Service Reform Act of 1978 (CSRA),[8] it intended to provide "an integrated scheme of administrative and judicial review [of adverse personnel actions taken against federal employees], designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." ***Id.*** at 445. That integrated scheme permitted plaintiff to contest portions of the RIF action before the MSPB under 5 U.S.C. § 7701.[9] Plaintiff, in fact, did so. The review procedure further provides for an appeal of the MSPB's decision to the Court of Appeals for the Federal Circuit. Plaintiff also availed himself of this procedure. As found in 5 U.S.C. § 7703(b)(1), however, the CSRA gives the Federal Circuit exclusive jurisdiction in terms of

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[8] Pub. L. No. 95-454, 92 Stat. 1111 (codified in scattered sections of 5 U.S.C.).

[9] An employee "may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the board under any law, rule, *or regulation*." 5 U.S.C. § 7701(a) (1994) (emphasis added). In turn, 5 C.F.R. §351.901 (1995) states that demotions resulting from a RIF are appealable to the MSPB.

judicial review of MSPB decisions and does not envision any review by the Court of Federal Claims."[10] *See also* ***Bodine v. United States***, 14 Cl. Ct. 661, 663, *aff'd*, 865 F.2d 269 (Fed. Cir. 1988), *cert. denied*, 490 U.S. 1048 (1989). Therefore, to the extent that the matters fall within the review procedure of the MSPB and the Federal Circuit, this court has no jurisdiction. As discussed below, however, not all matters currently before this court were subject to the MSPB's authority.

B. Res Judicata

As stated in part I above, the court will apply the doctrine of *res judicata* to bar plaintiff's cause of action if a competent court has already made a final judgment on that action. ***International Order of Job's Daughters***, 727 F.2d at 1091; ***Golder***, 15 Cl. Ct. at 517. Therefore, in the present case, the application of *res judicata* depends on the MSPB's jurisdiction and the decisions made pursuant to that jurisdiction.

For example, the MSPB found that it had jurisdiction over plaintiff's reduction in grade as caused by the RIF."[11] This is consistent with the applicable statutes and

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[10] Section 7703(b)(1) states, in pertinent part:

> [A] petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

[11] Def. App. at Tab A, p. 3.

regulations."[12] Despite this finding, the MSPB dismissed plaintiff's case because it was untimely. Plaintiff argues that the MSPB lacked jurisdiction under 5 U.S.C. § 5366 (1994), which states:

§ 5366. Appeals

> (a)(1) In the case of the termination of any benefits available to an employee under this subchapter on the grounds such employee declined a reasonable offer of a position the grade or pay of which was equal to or greater than his retained grade or pay, such termination may be appealed to the Office of Personnel Management under procedures prescribed by the Office.
>
> (2) Nothing in this subchapter shall be construed to affect the right of any employee to appeal –
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> . . .
>
> (B) under procedures prescribed by the Office of Personnel Management, any reduction-in-force action.

(b) For purposes of any appeal procedures (other than those described in subsection (a) of this section) or any grievance procedure negotiated under the provisions of chapter 71 of this title –

> (1) any action which is the basis of an individual's entitlement to benefits under this subchapter, and
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> (2) any termination of any such benefits under this subchapter,

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[12] *See* 5 *U.S.C.* § 7701(a); 5 C.F.R. §351.901.

> shall not be treated as appealable under such appeals procedures or grievable under such grievance procedure.

Specifically, plaintiff argues that the MSPB has no jurisdiction under § 5366(b)(1). While § (b)(1) denies the MSPB jurisdiction over certain issues, § (a)(2)(B) indicates that the MSPB maintains jurisdiction over reductions in grade resulting from a RIF. ***See also Thomas v. United States Postal Serv.***, 65 M.S.P.R. 268 (1994); ***Brown v. United States Postal Serv.***, 58 M.S.P.R. 345, 347, 349 (1993). Because the MSPB properly exercised jurisdiction over this matter, its decision, as affirmed by the Federal Circuit, is a complete bar and is conclusive as to plaintiff's claim for restoration of his service grade.

The MSPB, however, distinguished the reduction in grade concern from the reduction in pay issue. The MSPB indicated that, under § 5366(b)(1), it lacked jurisdiction over the issue of whether plaintiff's pay should have remained at the GM-14 level. Rather, the MSPB found that the OPM should resolve that issue. This finding is consistent with the language of § 5366 and with case law. 5 U.S.C. § 5366(a)(1) (directing appeals involving termination of benefits to the OPM); ***Zervas v. United States***, 26 Cl. Ct. 1425, 1426 & n.2 (1992) (indicating that the MSPB concluded that it lacked jurisdiction over retention of pay benefits and that the OPM addressed the matter instead); *see also* ***Schaffer v. MSPB***, 751 F.2d 1250, 1252 (Fed. Cir. 1985) (finding that 5 U.S.C. § 5366(b)(1) precluded the MSPB's jurisdiction over retention of pay matters). Thus, *res judicata* does not apply to plaintiff's claim for back pay because the MSPB did not render a decision on that claim, nor did it have jurisdiction to do so.

Moreover, although §5366(b)(1) denies the MSPB of jurisdiction, it does not affect this court's authority over that claim. ***Bosco v. United States***, 976 F.2d 710, 712-13 (Fed. Cir. 1992). In addressing the issue of this court's jurisdiction over pay retention matters, the court in ***Bosco*** examined the legislative history and context of § 5366 and found that it barred only one specific type of administrative review and that judicial review was beyond the scope of the provision. ***Id.*** at 713. The Court of Federal Claims has in fact, on at least one occasion, found jurisdiction to review the denial of pay retention benefits. *See* ***Zervas***, 26 Cl. Ct. 1425. In that case, Zervas was hired by the Army and received pay retention benefits because of a RIF action at his former position in the Air Force. Defendant later decided that its decision to grant pay retention benefits was erroneous. Zervas sought review of defendant's termination of benefits before the OPM. The OPM also determined that Zervas was not entitled to the benefits. Zervas then filed suit before this court, claiming his pay retention benefits under 5 U.S.C. § 5362.[13] The court

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[13] Section 5362 addresses grade retention following a change of position or reclassification and states, in pertinent part:

> (a) Any employee –
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> (1) who is placed as a result of reduction-in-force procedures from a position subject to this subchapter to another position which is subject to this subchapter and which is in a lower grade than the previous position, and
>
> (2) who has served for 52 consecutive weeks or more in one or more positions subject to this

found jurisdiction to review the matter based on the Bosco decision. ***Zervas***, 26 Cl. Ct. at 1429-1431.

The facts in the caw before the court are analogous. As in ***Zervas***, plaintiff initially received pay retention benefits as a result of a REP. Defendant later changed its position, claiming that plaintiff was not entitled to full pay retention benefits. Because plaintiff was unsuccessful with his claim before the OPM, plaintiff filed suit in this court based on 5 U.S.C. § 5362, among other statutes. Therefore, the holding in ***Bosco*** supports this court's jurisdiction over pay retention benefits just as it did in ***Zervas***.

Thus, given the review procedure described in ***Fausto***, 484 U.S. 439, this court lacks jurisdiction over plaintiff's reduction in grade claim. Even if the court had jurisdiction, the doctrine of *res judicata* would bar this claim. Neither *res judicata* nor ***Fausto's*** review procedure, however, affect plaintiff's reduction in pay claim. Accordingly, the court must decide whether plaintiff is entitled to summary judgment on its reduction in pay claim.

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subchapter at a grade or grades higher than that of the new position,

is entitled, to the extent provided in subsection (c) of this section, to have the grade of the position held immediately before such placement be considered to be the retained grade of the employee in any position he holds for the 2-year period beginning on the date of such placement.

C. Summary Judgment

Summary judgment is appropriate when the pleadings raise no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law. **RCFC** 56; ***Anderson v. Liberty Lobby Inc.***, 477 U.S. 242, 247 (1986). The moving party bears the burden of establishing an absence of evidence to support the nonmovant's case. ***Adickes v. S.H. Kress & Co.***, 398 U.S. 144, 157 (1970). The party opposing summary judgment has the burden of showing sufficient evidence, not necessarily admissible, of a genuine issue of material fact in dispute. ***Celotex Corp. v. Catrett***, 477 U.S. 317, 324 (1986). Any doubt over factual issues must be resolved in favor of the party opposing summary judgment, ***Litton Indus. Prods., Inc. v. Solid State Sys. Corp.***, 755 F.2d 158, 163 (Fed. Cir. 1985), to whom the benefit of all presumptions and inferences runs. ***H. F. Allen Orchards v. United States***, 749 F. 2d 1571) 1574 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 818 (1985). In the instant case, granting summary judgment would require an absence of genuine issues of material fact as to plaintiff's reduction in pay. Plaintiff's complaint, however, indicates that the OPM considered this matter yet dismissed plaintiff's claim. Plaintiff is silent, however, as to the reasons and particular facts that led to the OPM's decision. These facts might be persuasive in the court's decision in this matter. Because the pleadings raise factual questions and the court would benefit from further ventilation of the facts considered by the OPM, granting summary judgment for plaintiff would be inappropriate. *See* ***Philadelphia Suburban Corp. v. United States***, 217 Ct. Cl. 705, 707 (1978).

III. Additional Motions

In addition to defendant's motion to dismiss and plaintiff's motion for summary judgment, there are two other motions before the court. Plaintiff filed a "Motion to Close Record on Parties' Motion and Cross-Motion for Summary Judgment" on October 10, 1995. In response, defendant moved to strike plaintiff's motion on October 23, 1995, claiming that there is no basis in the RCFC for plaintiff's motion. Further, defendant indicated that plaintiff improperly used his motion to restate his arguments relating to the motions to dismiss and for summary judgment.

Defendant is correct in stating that plaintiff's motion merely restates his prior arguments raised in the motion to dismiss and motion for summary judgment. Plaintiff has already thoroughly addressed these arguments in his motion, response, and reply. As demonstrated in parts I and II above, the court is able to rule on the motion to dismiss and the motion for summary judgment based solely on the prior briefs. Therefore, because plaintiff's motion to close the record has no basis under the rules and because further argument is not needed, plaintiff's motion to close the record is moot. Accordingly, defendant's motion to strike is also moot.

Conclusion

For the reasons discussed above, defendant's motion to dismiss plaintiff's claims in case No. 94-227C is granted. Accordingly, the Clerk is instructed to dismiss the complaint in this case. No Costs.

In case No. 94-358C, plaintiff is precluded from litigating his claim for restoration of his civil service grade because this court lacks jurisdiction or, alternatively, under the doctrine of *res judicata*. Nevertheless, plaintiff is not precluded from moving forward with his back pay claim. Therefore, defendant's motion to dismiss as it applies to case No. 94-358C is denied. Plaintiff's motion for summary judgment, however, is also denied. The parties are directed to file a joint status report as to further proceedings regarding plaintiffs back pay claim under case No. 94-358C by March 25, 1996.

/s/ Bohdan A. Futey
BOHDAN A. FUTEY
Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES E. BROWN, Plaintiff, v. JOHN O. MARSH, Secretary of the Army, Defendant.	Civil No. 80-1169 (CRR)

ORDER

(Filed May 11, 1989)

In accordance with the Opinion of the Court issued on this date, it is by the Court, this 11th day of May, 1989,

ORDERED, that the plaintiff shall have judgment against the defendant for back pay in an amount, to be computed by the defendant, which reflects a retroactive promotion to GS-9, effective August 21, 1975, a retroactive promotion to GS-11, effective October 1, 1978, a retroactive promotion to GS-12, effective June 7, 1981, a retroactive promotion to GM-13, effective May 23, 1982, and compensation at GM-13 from May 23, 1982, to the present, all less amounts actually earned during the above period; and it is further

ORDERED, that the plaintiff shall for all purposes be deemed to have been promoted to the above levels on the above dates, including the computation of any pertinent cost-of-living allowances; and it is further

ORDERED, that the defendant shall place the plaintiff in a GM-13 position in his area of expertise, with the compensation and benefits appropriate to such a position; and it is further

ORDERED, that plaintiff shall be deemed to have received a career appointment on April 14, 1976, and defendant shall make all reasonable efforts to shift all Social Security (FICA) contributions made on behalf of the plaintiff between April 14, 1976, and April 27, 1980, to the Civil Service Retirement Fund, with any additional payments that may be required from the employer to be made by the Army, and any additional payments that may be required from the employee to be withheld from the back pay award described above; and it is further

ORDERED, that defendant shall be permanently enjoined, from the date hereof, from engaging in any acts or omissions on account of the plaintiff's race, or in reprisal for the plaintiff's having instituted this or any other action.

/s/ Charles R. Richey
CHARLES R. RICHEY
UNITED STATES
DISTRICT JUDGE